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**REPORTS**  
OF CASES  
ARGUED AND DETERMINED  
IN THE  
**SUPREME COURT OF TENNESSEE,**

FOR THE  
**EASTERN DIVISION,**  
SEPTEMBER TERMS, 1891 AND 1892;

FOR THE  
**MIDDLE DIVISION,**  
DECEMBER TERM, 1891;

AND FOR THE  
**WESTERN DIVISION,**  
APRIL TERM, 1892.

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**GEORGE W. PICKLE,**  
ATTORNEY-GENERAL AND REPORTER.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

EASTERN DIVISION.

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KNOXVILLE, SEPTEMBER TERM, 1891.

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INSURANCE COMPANY *v.* NORMENT.

(*Knoxville.* November 17, 1891.)

1. SUPREME COURT. *Will not disturb verdict, when.*

Supreme Court will not disturb verdict rendered upon conflicting evidence under a correct charge if there is material evidence to support it.

2. LIFE INSURANCE. *Notice of injury or death. Waiver.*

The condition in a life and accident policy requiring that "immediate written notice of an accidental injury or death" shall be given to the insurer at his home office is treated as either waived or sufficiently complied with in a suit upon the policy for assured's death, where the assured, having sustained his injury about the first of April, gave verbal notice thereof to the local agent some time in May following,

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which was promptly communicated to the home office by the agent through a letter, and thereafter the insurer, through his agents and physicians, made thorough examination of the case both before and after assured's death.

3. SAME. *Proof of death or disability. Waiver.*

The condition in a life and accident policy requiring "affirmative and positive proof of death, or loss of limb or sight, or of duration of disability" to be furnished to the insurer "within six months from date of death, or within thirty days from date of the termination of the period of total disability" is waived, where the insurer, having received due notice of the assured's injury and of his subsequent death or waived the same, proceeded to investigate the case thoroughly both before and after assured's death, and thereafter declined to investigate the claim or to furnish instructions and blank forms for proof of death upon the request of the beneficiary in the policy, made in due time, unless he would sign, as a condition precedent, an agreement whereby his claim might have been lost or prejudiced.

4. SAME. *Limitation as to time of bringing suit.*

The condition in a life and accident policy forbidding suit thereon within three months next after receipt of proofs of death or disability at the home office, cannot be invoked by the insurer to defeat suit brought within that time, where he has waived such proofs, and absolutely refused, upon untenable grounds, to consider or settle assured's claim.

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FROM HAMILTON.

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Appeal in error from Circuit Court of Hamilton  
County. JOHN A. MOON, J.

GEORGE T. FRY for Insurance Company.

CREED F. BATES for Norment.

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LURTON, J. On March 18, 1890, the American Accident Insurance Company issued to W. T. Norment an accident policy of insurance for five thousand dollars. This policy was for the term of one year, and insured him in the sum of twenty-five dollars per week against loss of time, not exceeding fifty-two consecutive weeks, resulting from bodily injuries effected during the term of this insurance, "through external, violent, and accidental means;" "or, if death shall result from such injuries alone within ninety days, will pay the sum of five thousand dollars to Virginia F. Norment, his wife."

Norment died on June 26, 1890, and his widow sued alleging that his death occurred as the result of an accidental, external injury received by him while said policy was in force. There was a jury, verdict, and judgment in favor of the plaintiff below.

The first error assigned is that the death did not occur within ninety days after sustaining an accidental injury, and as a consequence of such injury alone. There was conflicting evidence as to the cause of the death of the insured. There was evidence tending to show that deceased had fallen upon a slippery sidewalk, striking the back of his head, and that his death resulted from this injury. There was likewise evidence tending to show that death was caused by disease having no direct connection with this injury. There was a *post mortem* examination and conflicting opinion from the attend-



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ing medical men as to the cause of death. The question as to whether death resulted alone from accidental, external injury was submitted to the jury under a correct charge; and, under the well-settled rule of this Court, the finding of the jury, being supported by material evidence, cannot be disturbed.

There was evidence that this accidental injury occurred on March 23, 1890, and there was evidence that the date when this injury was received was March 30. If it occurred on the earlier date, then the death did not occur until after expiration of ninety days. If it was sustained on the later date, then Mr. Norment died within ninety days thereafter, and within the terms of the policy.

Mrs. Norment's letter to the company notifying it of the injury stated March 23 as the day of injury. This letter was written before her husband's death, and with a view of claiming the indemnity against loss of time resulting from the injury. We do not think this concluded her from showing, if she could, that she was mistaken in this date. The date was not then material, as Mr. Norment was not disabled so as to be prevented from attending to his ordinary business for fully a week after sustaining the injury, and no indemnity was claimed or paid for any disability between the two dates. The weight of evidence seems to have been in favor of the date originally stated by Mrs. Norment; but there was evidence, if credited by the jury, sufficient under the rule to support a finding

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in favor of the later date. The first and third assignments, being substantially the same, are overruled.

The fourth condition of the policy was in these words:

“Immediate written notice of an accidental injury or death for which claim may be made, must be given to the company at Louisville, Kentucky, with full particulars thereof—when, where, and how it occurred, with full name and address of the insured—and failure to give such notice shall invalidate all claims under this insurance; and unless affirmative and positive proof of death, or loss of limb or sight, or of duration of disability is so furnished within six months from date of death, or within thirty days from date of the termination of the period of total disability, then all claims based thereon shall be forfeited to the company. No legal proceedings for recovery hereunder shall be brought within three months after receipt of such proof at the office of the company in Louisville, Kentucky, nor at all unless begun within one year from date of alleged accident.”

Plaintiff in error insists that no such notice was given of this injury as is required by the clause quoted, and that no proof of injury or death was received at the office of the company at Louisville before institution of this suit.

There was evidence that plaintiff went to the office of the local agent more than once for the purpose of notifying him of this injury sustained

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by the assured. Not finding the agent in, she notified a female clerk in the office, and asked her to see that the agent called upon Mr. Norment. Of this the local agent was notified, who thereupon in writing notified the office at Louisville of the claim. The home office at once notified the local agent to investigate the matter. At the request of the local agent the physician of the company called to see Mr. Norment, and made an examination. This was on the first of June. Afterward the general agent from Louisville, together with the company's surgeon, called upon and took statement of plaintiff and examined the assured. This general agent, as testified to by Mrs. Norment, then said to her that by her delay Mrs. Norment had forfeited all claim under the policy, but that the company did not desire to take any technical advantage, and that the case should be investigated on its merits. In addition to all this actual notice, plaintiff procured a friend to write to the home office as to this claim. After the death of Mr. Norment the company's surgeon participated in a *post mortem* examination held for the purpose of ascertaining cause of death.

The learned Circuit Judge charged the jury that it must appear that written notice had been given within a reasonable time after this injury was sustained, but that written notice might be waived; and it was for the jury to look to all the circumstances and say whether written notice had been given, or, if not, had such notice been

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waived, and had such notice been given within a reasonable time. The notice to the local agent was given some time between the first and last of May. The seriousness of the injury did not become apparent until early in April. The notice to local agent was not in writing, nor was it given by plaintiff or assured personally to the Louisville office. When a policy requires notice of an injury or loss to be given in writing to the home office, it is not always necessary that it be given by the assured himself. It is sufficient if it is given at the request of the assured by the agent of the insurer. Here the local agent was requested to investigate this accident. He wrote the company under this notice received by him. Written notice from the local agent of the insurers has been held sufficient where such notice was the result of information communicated by the assured. Wood on Insurance, 938, 939.

The purpose of such notice is to give the insurer opportunity to investigate for itself the cause and extent of the injury. This actual notice was received by the company, and the case in fact investigated. The jury might well, on the facts shown as to this investigation, both before and after death of assured, find that written notice had been waived and that actual notice had been given within a reasonable time.

The very able counsel for the company has very earnestly argued that even if all this be so, that this suit was premature; that it was brought

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within less than three months after death of assured, and before the receipt of proof of injury and death at office of the company in Louisville. The Court was on this point requested to charge "that no legal proceedings for recovery upon the policy sued on could be brought until after the expiration of three months after receipt of affirmative and positive proof of death of the insured at Louisville; and if from the evidence it should appear that this suit was brought before proof of the death of Mr. Norment was received by the company, or before the expiration of three months after such proof was received by the company at its office in Louisville, Kentucky, then your verdict should be for the defendant." This was charged with this modification: "That request is the law as I have heretofore charged you. If you find from the proof that this notice was waived, and suit brought within three months after the waiver of the condition, then the plaintiff can recover." Elsewhere the jury had been charged as to what facts would constitute a waiver under this policy. Counsel now insist "that there is no evidence in the record to justify a charge that the provisions of this clause of the policy had been waived." It is a mistake to assume that the jury were charged that this provision of the policy had been waived. The jury were instructed that it might be waived, but the fact of waiver was left to their determination.

We have already recited the facts concerning

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actual notice of both injury and death, and of the investigation actually made by the insurer. In addition, we may add that plaintiff, through her agent, did in writing notify the company of the death of her husband, and request blank forms for proofs of injury and death. To this the company replied, declining to make an investigation until Mrs. Norment should sign and return an agreement in the following words:

"I hereby agree that in the event of the American Accident Company making an investigation of my claim against them for injuries received by my husband, W. T. Norment, on March 23, 1890, they shall not be considered to have waived the failure on my part to give immediate notice of the injury."

She declined to sign this paper, being unwilling to fix March 23 as the date of injury, thereby cutting off her claim that the death of her husband had resulted from an injury received within ninety days prior to his death.

She again requested "information in regard to proof of claim, etc.," and asked an early reply. The company again declined to proceed unless she would sign the agreement previously sent. A third letter was written requesting instruction and blank forms for proofs of death. Again the company refused to send such blanks or investigate unless she would sign an agreement identical with the first sent, save in omission of day of injury. Upon this repeated refusal to give instructions or send

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Insurance Company v. Norment.

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blanks this suit was brought. The agreement as last sent was prejudicial to the claim of plaintiff, in that it was, in effect, an admission that she had failed to give immediate notice of the injury. This construction, while not necessarily following, was possible, and indeed probable, and it is clear that to have signed it would have put her case in peril. This she was not bound to do. The refusal to aid her with instructions or forms, or to investigate, unless she would prejudice her case by signing an agreement which the insurer had no right to require her to sign, was evidence upon which the jury could well predicate a verdict of waiver of proof of death. This, together with the fact that the company had in fact investigated before the death of assured, and been represented at the *post mortem* after his death, makes a clear case of waiver of the technical proofs of death required by policy. This conduct was equivalent to an absolute refusal to consider or settle the case. When the insurer waives proof of injury or death, and refuses out and out to treat as to liability, save upon prejudicial and illegal conditions, suit may be brought at once, notwithstanding the clause postponing suit until ninety days after receipt of proofs of injury. A provision exempting an insurer from suit for a definite time after proofs of loss have been made, will be waived where there has been a waiver of such proofs and a refusal to pay. Lawson on Rights, Remedies, and Practice, Secs. 2084, 2086, and cases cited; Am.

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& Eng. Ency. of Law, Vol. II., 349, 350, and cases cited.

The result is that we find no error in the charge or refusals to charge.

Affirm the judgment.



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Bank v. Lumber and Manufacturing Co.

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BANK v. LUMBER AND MANUFACTURING CO.

(*Knoxville*. November 17, 1891.)

1. CORPORATIONS. *Not insolvent, when.*

A corporation is not insolvent in such sense that its assets become a fixed trust fund in the hands of its officers for *pro rata* distribution among its creditors, so long as it continues to be a going concern, conducting its business in the ordinary way, although its debts may greatly exceed its assets.

Cases cited and approved: *Moseby v. Williamson*, 5 Heis., 278; *Comfort v. McTeer*, 7 Lea, 660.

2. ATTACHMENT. *Of assets of insolvent corporation.*

And attachment for sufficient cause of the assets of such indebted corporation by some of its creditors secures them priority over other creditors, although the corporation subsequently commits a decisive act of insolvency, as, *e. g.*, by general assignment and cessation of business.

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FROM MARION.

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Appeal from Chancery Court of Marion County.  
T. M. McCONNELL, Ch.

W. T. MURRAY and FRANK SPURLOCK for Bank.

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Bank v. Lumber and Manufacturing Co.

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BROWN & SPEARS, ANDREWS & BARTON, BRIGHT & EARLY, and BYRON POPE for Company.

TURNER, Ch. J. The North Alabama Lumber and Manufacturing Company was a corporation doing business in Alabama and Tennessee, its chief office at Bridgeport. On September 2, 1889, its liabilities were \$208,857. By subsequent sales there were realized \$24,898, which constituted its entire assets. On September 30, 1889, the City Savings Bank and others attached the property in Tennessee. On October 7 the First National Bank of Tullahoma filed a similar bill. Other bills were subsequently filed, aggregating perhaps a dozen. The defendant company was in full operation, transacting its usual business, in possession of its property, and running its plant in the State of Alabama up to October 3, 1889, when its property was levied upon at the instance of the City Savings Bank by attachment issued from the Federal Court at Huntsville. On October 14, 1889, defendant company made a general assignment. On October 11 the company and the City Savings Bank entered into an agreement, the company to confess judgment in favor of the bank in the cause at Huntsville for \$17,191.78, the property attached to be condemned and sold for satisfaction of the amount decreed; that the company should make a general assignment of all its property in both States, with power of sale, and to satisfy first out of the Alabama property the Alabama

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Bank v. Lumber and Manufacturing Co.

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judgment; that the company should confess a judgment in favor of the bank for \$3,500 in the proceedings in Tennessee, to be first paid out of the Tennessee property.

On August 20, 1890, the First National Bank of Tullahoma filed a bill against all the other attaching creditors and the Lumber and Manufacturing Company, charging that at the date of the attachments it was insolvent; that the attachments did not secure priority of payment, and the property must be held in trust for the payment of all creditors.

"A creditor of an insolvent corporation is entitled to pursue the ordinary legal and equitable remedies for the enforcement of his claims, unless he is restrained from doing so at the suit of the corporation or of other creditors. Neither the corporation or other creditors would be able to prevent him from pursuing the ordinary remedies given to creditors, except by instituting proceedings for the purpose of securing a general distribution of the company's assets," etc. 2 Morawetz on Private Corporations, 364.

There were, at the time of the filing of the attachment bill, no evidences of insolvency, and none charged. The grounds charged are non-residence and fraudulent disposition, and seeking an ordinary remedy.

In *Moseby v. Williamson*, 5 Heis., 278, Nicholson, Ch. J., said: "It appears in proof that plaintiff became creditor of the savings institution after it closed and suspended, but before steps

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Bank v. Lumber and Manufacturing Co.

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were taken to wind it up as an insolvent corporation. It is provided by the bankrupt law that if a bank stops or suspends fraudulently for a period of fourteen days it is deemed to have committed an act of bankruptcy, but if the suspension be not fraudulent, it is not an act of bankruptcy. In analogy to this rule as to bankruptcy, we cannot see upon what ground the insolvency can be assumed from the simple fact of closing its doors for two or three days, or until some such step as filing a bill to have its insolvency determined has been taken."

"There must be some positive act of insolvency, such as the filing of a bill to administer the assets, or the making of a general assignment or a permanent cessation to do business." *Comfort v. McTeer*, 7 Lea, 660.

In the present case there was no stop, no suspension of business, no closing of doors; on the contrary, there was no lack of active operation on the part of the company, and its officers were hopeful of success.

The assets of a corporation are a trust fund for the benefit of creditors only from the date of assured insolvency, and a creditor having a right to sue in one of the ordinary ways at law or in equity, not suggesting insolvency, is not to be deprived of the fruits of his action because insolvency may thereby be brought about or hastened.

Decree reversed, and decree here giving creditors priority in the order of their several attachments.

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Haworth v. Montgomery.

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HAWORTH v. MONTGOMERY.

(*Knoxville.* November 17, 1891.)

PHYSICIANS. *Practicing without license not entitled to recover compensation for services rendered.*


Physician cannot recover compensation for professional services rendered since Act 1889, Ch. 178, went into effect—viz., on June 3, 1889—unless he had, prior to rendering such services, qualified himself to practice medicine in this State by obtaining the certificate of authority required by that Act, and having it duly recorded as therein prescribed.

Act construed: Acts 1889, Ch. 178.

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FROM RHEA.

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 Appeal in error from Circuit Court of Rhea County. ARTHUR TRAYNOR, J.

S. W. SWABY for Haworth.

FRED L. MANSFIELD and W. B. MILLER for Montgomery.

LURTON, J. Plaintiff in error, claiming to be a practitioner of medicine, sued the defendant upon

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Haworth v. Montgomery.

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an account for medical services rendered between December 18, 1889, and January 20, 1890. There was a judgment for the defendant.

By the first section of Chapter 178 of the Acts of 1889 it is provided "that no person shall practice medicine in any of its departments, except dentistry, within this State, unless such person possess all the qualifications required by this Act." The Act then proceeds to prescribe the manner in which one may continue or enter upon the practice of the medical profession.

By Section 2 of same Act, it is provided "that all persons who shall be in the actual practice of medicine or surgery in the State at the time of the passage of this Act, shall, within six months after this Act takes effect, be required to make satisfactory proof of this fact to the County Court Clerk of the County in which he resides, when said County Court shall issue a certificate in accordance with the facts, and such certificate shall entitle the lawful holder thereof to all the privileges contemplated in this Act. A certified copy of this certificate shall be forwarded to the State Board of Medical Examiners."

This Act was passed April 3, 1889, and took effect June 3, 1889, sixty days after its passage. Miss Haworth did not comply with this provision within the six months prescribed by the Act, nor obtain a certificate from State Examiners as otherwise provided in that Act. At the time the services sued for were rendered, she was not a

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*Haworth v. Montgomery.*

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person authorized to practice medicine in this State, and by the fourteenth section of the Act was liable to the penalty of twenty-five dollars for practicing without license.

Plaintiff in her evidence states that on February 25, 1891, she did register herself before the County Court Clerk and obtain his certificate. This was after the services rendered to defendant, and was done by virtue of the provision in the Act of 1891, Chapter 109, amending the Act of 1889. By this amendment the time within which an actual practitioner might register before the County Court Clerk and obtain the certificate provided by the second section of the Act of 1889 was extended to July 1, 1891. This cannot help plaintiff's case, for at the time she attended defendant she was prohibited from practicing, and her subsequent registration and compliance with the law can have no retrospective effect.

Plaintiff says that prior to this compliance with the law, she had obtained what she calls a "temporary license," but cannot say that she had this "temporary license" at time she attended defendant. She admits that this "temporary license" was never recorded as required by Section 9 of Act of 1889. This section requires that "every person holding a certificate from the State Board of Medical Examiners, or the County Court Clerk, shall have it recorded in the office of the County Court Clerk in which he resides, and the date of record shall be indorsed thereon. Until such record is made,

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Haworth v. Montgomery.

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the holder of such certificate shall not exercise any of the rights or privileges therein conferred to practice medicine."

In view, therefore, of the plain provision of this section, it cannot matter what the character of her "temporary license" was, inasmuch as it was not recorded. The contract sued upon was one expressly prohibited by the statute. Where a statute has for its manifest purpose the promotion of some object of public policy, and prohibits the carrying on of a profession, occupation, trade, or business, except in compliance with the statute, a contract made in violation of such statute cannot be enforced.

This is familiar law, and the judgment must be affirmed.



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 Ruohs v. Athens.
 

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## RUOHS v. ATHENS.

(Knoxville. November 17, 1891.)

1. MUNICIPAL BONDS. *Void in hands of bona fide holder for value, when.*

If the charter of a municipal corporation is absolutely void, its bonds, though regular and proper in every other respect, are void, even in the hands of a *bona fide* holder for value. There is in such case no corporate existence, and therefore no corporate power, and of such defect the purchaser of municipal bonds must, at his peril, take notice.

Case cited and approved: 118 U. S., 425.

2. MUNICIPAL CORPORATIONS. *Charter of void, when.*

A municipal corporation, acting under charter purporting to have been issued pursuant to Acts 1875, Ch. 92, entitled "An Act to regulate and organize municipal corporations," etc., and Acts 1877, Ch. 121, amendatory thereof, has not, in contemplation of law, any existence or powers unless there has been indorsed upon the application for charter and registered with it, the certificate of the officer holding the election as to "corporation" or "no incorporation" showing "the number of voters on the list, and that at least two-thirds thereof have voted in favor of the incorporation of the town."

Acts construed: Acts 1875, Ch. 92; Acts 1877, Ch. 121, Sec. 8.

Case cited and approved: Hooper v. Rhea, MS., Knoxville, 1885.

3. SAME. *Repeal of charter.*

Athens was incorporated in 1860, by the County Court, pursuant to the general law contained in § 1349 *et seq.* of Code of 1858. On February 25, 1870, an Act was passed granting Athens a special legislative charter. The corporation accepted this charter, organized and existed under it until 1879, when an Act was passed repealing the charter of 1870.

*Held:* Athens was without corporate existence after the repealing Act of 1879. The County Court charter was abandoned by acceptance

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Ruohs v. Athens.

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of legislative charter of 1870, and was not revived upon repeal of that charter.

Code construed: §§ 1349 *et seq.* (T. & S.).

Acts construed: Acts 1869-70, Ch. 69; Acts 1879, Ch. 255.

Case cited and approved: *Burk v. State*, 5 Lea, 349.

4. CONSTITUTIONAL LAW. *Validity of repealing statutes.*

By §§ 39-49, inclusive, of an Act passed February 25, 1870 (prior to Constitution of 1870), Athens was granted a legislative charter. This Act embraced several distinct subjects, and its title contained no reference to this part of its subject-matter. By an Act passed in 1879 this charter was repealed. The repealing Act gave no intimation, either in its caption or body, of the nature of the legislation to be repealed, but recited in its caption the title of the Act of 1870, and in express terms repealed "Sections 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, and 49 of Chapter 69 of an Act passed February 25, 1870."

*Held:* This repealing Act of 1879 does sufficiently recite in its "caption or otherwise the title or substance of the law repealed."

Constitution construed: Art. II., Sec. 17.

Acts construed: Acts 1869-70, Ch. 69; Acts 1879, Ch. 255.

5. SUPREME COURT. *Its opinions, how construed.*

In determining what has been decided by an opinion of this Court, the statement of facts contained in the opinion must be taken as conclusive, and may not be changed or corrected by reference to the record or otherwise.

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FROM M'MINN.

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Appeal from Chancery Court of McMinn County.  
H. R. GIBSON, sitting by interchange.

DEWITT, THOMAS & DEWITT, and PRITCHARD, SIZER  
& THOMAS for Ruohs.

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Ruohs v. Athens.

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ROBESON & GASTON, P. B. MAYFIELD, and BURKETT,  
MANSFIELD & TURLEY for Athens.

SNODGRASS, J. Complainant brings this suit to recover of defendant, alleged to be an incorporated town of this State, the amount now due him upon certain interest-bearing bonds issued by defendant on October 1, 1888. There were twenty-two of these bonds, of the denomination of \$1,000 each, payable to bearer October 1, 1908, with interest at six per cent., payable semi-annually, evidenced by coupons attached. They were issued to the Nashville and Tellico Railroad Company in consideration for stock subscribed by defendant. The bonds were purchased by complainant, who is a *bona fide* holder, and they were regularly issued and under proper legislative authority, and are valid and binding obligations of defendant if defendant is a legally incorporated city, or if, as between itself and complainant, it cannot rely on the defense of non-corporate existence now interposed.

At the time of the issuance of said bonds, and for some years prior thereto, it was acting as a corporation. As such it issued the bonds through its proper officers, and under its corporate seal, with such recitations as were proper, and showed the legality of the bonds in case they were issued by the corporation duly organized.

It did assume a legal existence as a municipal corporation, and legal power as such to issue the bonds. Legislative power thus assumed existed to

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Ruohs v. Athens.

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issue the bonds, if it were a corporation, and the first question is: Was it a corporation legally, as well as in fact, organized.

It appears that the town of Athens was originally incorporated by the County Court of McMinn County, in the year 1860, under Code, §§ 1349 *et seq.*, but that that organization of the corporation was superseded by the organization of the town as a municipal corporation under the Act of 1869-70, Chapter 69, Sections 39 *et seq.*, pages 500 *et seq.*; that the Act of 1869-70 was repealed by the Act of 1879, Chapter 255, page 296, and said repeal was accepted and acquiesced in; that the town was without municipal organization or government until June or July, 1881, when an attempt was made to organize said town into a municipal corporation under the Act of March 25, 1877 (Acts 1877, Chapter 121, amending Acts 1875, Chapter 92), which attempt was void because the certificate of the Sheriff holding the election was not indorsed on the application and registered with it, as required by Section 8 of the Act of 1877, Chapter 121.

This was the defense set up by defendants, the last Board of Mayor and Aldermen of the town, averring, in consequence, that all acts under such attempted incorporation were void, together with further plea that they had resigned, and their resignations had been accepted before the filing of complainant's bill.

We state the above facts respecting the incorporation and repeals and effort to re-organize and

failure, because without elaborating the propositions or debating the questions involved in the statement, we hold them to be settled as stated, and time forbids that we should attempt the detailed answer to the able and elaborate arguments of complainant's counsel to the contrary, which these arguments so well merit.

It is sufficient to say that it has been settled that the Act of 1879 repealed the charter of 1870, and this did not revive the incorporation of 1860. *Burk v. The State*, 5 Lea, 349.

It is said this case should not be followed, that it was upon an agreed statement of facts, and, even if correct thereon, is erroneous on the real facts. It does not appear to be on an agreed statement of facts, and we cannot look outside the opinion to determine that question. What appears in an opinion is the matter submitted to the Court and agreed to in consultation, and not that which might have existed and not been submitted. The Court concurs in an opinion as it appears, and is bound by it, and not by any thing outside of or beyond it. The record cannot be looked to to correct or change it. But besides, the opinion deals with the question of effect of repealing statutes which could not have appeared differently to the Court then and now.

In this opinion a litigation fairly involving the very questions now in issue was discussed and disposed of. It is conclusive, and we have no disposition to review it.

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Ruohs v. Athens.

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Here the repealing Act of 1879 was held valid, but in this case it is again assailed as void under Section 17 of Article II. of the Constitution providing that "Acts which repeal, revive, or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived, or amended."

The Act is not open to this objection. It does in its caption recite the title of the Act repealed.

It is not necessary to pursue the argument of complainant's counsel that this repealing Act is an exception because the title of the Act repealed conveyed no idea of the purpose of the last Act. The Act by reference to that repealed, when the latter was read, did show its purpose. It would mislead no one who read the Act referred to.

The town of Athens was therefore not incorporated when it made an effort to organize under the Act of 1877. That effort failed for the reason that the certificate of the Sheriff holding the election was not indorsed on the application for charter and registered with it. The charter was therefore void by express provision of the statute. Acts of 1877, Ch. 121, Sec. 8, p. 146; *Hooper v. Rhea*, MS., Knoxville, 1885.

It consequently, follows that the town of Athens was not a legally incorporated town when it issued the bonds in question. This brings us to the most serious question in the case: Whether the defendant can now rely on the defense of no cor-

porate existence, having acted as a corporation and issued the bonds while in apparent exercise of legal corporate power. This is a question of much difficulty. There is a line of most respectable cases on the negative of the proposition stated, but in none of them is the question determined that a corporation attempting to organize under a general law which declares that the charter shall be void for non-compliance with special provisions thereof, shall be held by estoppel or otherwise to be a corporation. But whatever may be the rule held elsewhere, it is settled here in cases most maturely considered that a body or corporation having no legal existence has no legal power to issue bonds or obligations of a binding character, and that such body or corporation does not obtain a *de facto* status so as to require a direct proceeding by the State to avoid its existence or its acts. In the two opinions in *Hooper v. Rhea*, already referred to, the last proposition is settled, and the first is determined in certain cases in this State, cited and approved in case of *Norton v. Shelby County*, 118 U. S., 425; Lawyers' Co-op. Ed., Book 30, p. 178.

The rule here established, and which met the approval of that Court in that case, was that want of power to issue involved want of legal creation of the body which did issue the bonds, and that if there was no *de jure* office created which could be filled, there could be no *de facto* officer filling it; if there was no *de jure* corpora-

tion, it could have no *de facto* representation. This is a sound view, and we re-assert it as correct.

Such a rule would not of course apply to irregularly organized corporations, or those which obtained such validity by special grant of the State or compliance with general law, as to be merely voidable organizations, and such as the State by direct proceeding could alone dissolve; but where the Constitution or the statute provides that acts done or omissions occurring in effort to organize a municipal corporation shall render the attempt to organize and the charter invalid and of no force whatever, it is not left to the Court to disregard this statutory or constitutional prohibition at the instance of a creditor deceived by the appearance of an organization. It was his duty to ascertain, first, is there a legal corporation; and, second, has it power to issue the bonds proposed to be sold. He must, at his peril, determine both questions for himself.

The decree is affirmed with cost.





CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF TENNESSEE,  
FOR THE  
MIDDLE DIVISION.

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NASHVILLE, DECEMBER TERM, 1891.

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BOONE & HOWISON *v.* BUSH.

(*Nashville.* December 12, 1891.)

SET-OFF. *Defendant entitled to trial upon his plea of, although plaintiff dismisses his suit.*

Although the plaintiff dismisses his suit, the defendant is entitled to a trial upon his plea of set-off. This rule is applicable to suits in both the Circuit and the Justices' Courts.

Code construed: §§2922, 4160 (T. & S.); §§3632, 4936 (M. & V.).

Acts construed: Acts 1879, Ch. 222.

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Boone & Howison v. Bush.

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Cases cited and approved: *Riley v. Carter*, 3 Hum., 232; *Galbraith v. Railroad*, 11 Heis., 169; *Edington v. Pickle*, 1 Sneed, 122; *Baker v. Grigsby*, 7 Heis., 627; *Brazelton v. Railroad*, 3 Head, 571.

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FROM SUMNER.

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Appeal in error from Circuit Court of Sumner County. A. H. MUNFORD, J.

S. F. WILSON and GEORGE W. BODDIE for  
Boone & Howison.

J. J. TURNER and T. C. MULLIGAN for Bush.

CALDWELL, J. E. T. Bush and wife commenced this action in the Circuit Court of Sumner County, to recover from Boone & Howison \$1,500, as damages for misrepresentations alleged to have been made by them in the sale of thirty barrels of seed Irish potatoes.

Among the several defenses interposed by the defendants was a plea of set-off, in which they averred that the plaintiffs owed them \$150 for said potatoes, and sought a judgment for the same.

The case was once tried in the Circuit Court, and appealed in error to this Court. Here the judgment below was reversed and the case remanded for a new trial.

Thereafter, when called for a second trial in the Circuit Court, the plaintiffs appeared and voluntarily dismissed the suit. The defendants objected to the dismissal so far as their claim against the plaintiffs was concerned, and sought a trial on their plea of set-off; but judgment was pronounced and entered dismissing "the whole suit, including the set-off and cross-action of the defendants."

From this judgment defendants have appealed in error.

Generally a party plaintiff may dismiss his suit whenever he chooses to do so, and the defendant will not be heard to object. In the ordinary case the defendant's attitude is one of resistance merely, and his only object is to defeat the plaintiff's action. He has no other interest in the litigation; hence, if the plaintiff comes and voluntarily dismisses his suit, the defendant must acquiesce—he can ask nothing more. By the voluntary dismissal every thing is accomplished which could be attained by a trial and successful defense.

That rule, however, is not applicable in the case before us. This is an exceptional case, wherein the attitude of the defendants is both *defensive* and *aggressive*; not *defensive* merely, as in the ordinary suit.

By Section 1, Chapter 53, Acts 1815, Justices of the Peace were authorized to render judgment in favor of a defendant pleading a set-off, for such sum as might appear to be due him in excess of the demand established against him

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Boone & Howison v. Bush.

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by the plaintiff. 2 Scott's Laws, p. 206; Code, § 4160.

That Act materially changed the attitude of the parties to such a case, and conferred upon the defendant therein such interest and right in the litigation that the plaintiff could not dismiss his suit at pleasure, and thereby deprive the defendant of a trial on his plea of set-off. It was so adjudged in *Riley v. Carter*, 3 Hum., 232.

The Act of 1815 related alone to cases originating before Justices of the Peace; but a similar provision was made by Section 2, Chapter 259, Acts 1851-52, with reference to cases brought in the Circuit Courts of the State. Code, § 2922.

This enactment changed the attitude and affected the interests and rights of the parties litigant in the Circuit Courts in the same manner, and to the same extent, as those of parties to a litigation before Justices of the Peace were changed and affected by the Act of 1815; consequently, the same reasoning by which the plaintiff's right to dismiss his suit was denied in the case of *Riley v. Carter*, *supra*, is available to show that the plaintiffs in the case before us had no power to dismiss their suit over the objection of the defendants, and that the action of the Circuit Judge, in permitting the dismissal, was erroneous.

In *Galbraith v. Railroad*, 11 Heis., 169, it was decided that a plaintiff in an action at law in the Circuit Court, could not dismiss his suit, after an account had been ordered and a report made

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Boone & Howison v. Bush.

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showing a balance in favor of the defendant on his plea of set-off.

Though the plaintiff, in the cases contemplated by the Acts of 1815 and 1851-52, has no power to dismiss his suit, it has been several times held that the defendant's right to judgment for balance in his favor, on a plea of set-off, is incidental to and dependent upon the plaintiff's having 'actually established a debt, in some amount, against him; and that if, upon trial, it turned out that the defendant owed the plaintiff nothing in the first instance, the right of set-off would not exist, and the defendant could have no recovery against him for a proven debt. *Edington v. Pickle*, 1 Sneed, 122; *Brazelton v. Railroad*, 3 Head, 571; *Baker v. Grigsby*, 7 Heis., 627; *Galbraith v. Railroad*, 11 Heis., 174.

To meet that construction and enlarge the former enactments the Act of 1879 was passed. It provides that "if the defendant pleads a set-off to plaintiff's debt, and it appears that there is a balance due in favor of the defendant, the Justice or the Court trying the case shall enter up judgment in favor of the defendant and against the plaintiff for such balance; and if the plaintiff fails in establishing any demand against the defendant, the defendant shall have judgment against the plaintiff for the amount which the proof upon his cross-action shows that he is entitled to, with costs." Acts 1879, Ch. 222, Sec. 1; Code (M. & V.), §4936.

Under this Act, the defendant pleading a set-off

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Boone & Howison v. Bush.

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has greater rights than under the former Acts, and for the better reason may dispute the plaintiff's power to dismiss the suit; his right to a recovery for whatever indebtedness he may establish under his plea of set-off, is no longer dependent upon the plaintiff's having established a demand of smaller amount against him.

When the defendant files his plea, averring a counter claim, he becomes to that extent an actor, an aggressor, in the litigation; and the plaintiff can no more defeat his right to a trial by a dismissal of the suit, than the defendant can destroy that of the plaintiff by a withdrawal of his plea.

The Act of 1879 includes suits originating in the Circuit Courts as well as those commenced before Justices of the Peace. The provision is that "*the Justice or Court* trying the case shall enter judgment in favor of the defendant," etc. If Justices of the Peace alone had been contemplated as recipients of the enlarged power, the word "Court" would not have been used in the Act.

It is true that the section of the Code amended related alone to cases before Justices of the Peace; nevertheless, it was allowable that the Legislature should by amendment enlarge the provision so as to embrace all cases of set-off, whether pending before Justices of the Peace or in Courts of record.

Reverse and remand.

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Railroad v. Wallace.

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## RAILROAD v. WALLACE.

(Nashville. December 12, 1891.)

1. INTEREST. *Not allowable as part of verdict for personal injuries.*

In suit to recover damages for personal injuries not causing death, it is error for the Court to instruct the jury that they may in their discretion allow interest upon the amount of damages awarded, and include it in their verdict. Interest cannot be allowed at all in such case.

Cases cited and approved: 79 Ga., 574; 81 Ga., 397; 104 Pa., 306.

2. REMITTITUR. *Of excessive verdict cures error, when.*

But where, in such case, the jury's verdict shows the amount of damages awarded and the amount of interest allowed thereon in separate items, this Court will not reverse the case, there being no other error, if the plaintiff will enter remittitur of the interest.

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FROM SUMNER.

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Appeal in error from Circuit Court of Sumner County. H. C. CARTER, Sp. J.

J. J. TURNER for Railroad.

S. F. WILSON, R. K. GILLESPIE, and GEORGE W. BODDIE for Wallace.



SNODGRASS, J. The defendant in error, while in the service of the Louisville and Nashville Railroad Company as brakeman, sustained severe personal injury resulting in the loss of a leg, which he alleged was occasioned by the negligence of the company. He sued for \$15,000 damages, and recovered judgment for \$9,940.

The railroad company appealed and assigned numerous errors. It is not deemed material to notice but one of them, as the others are not well taken, and involve nothing new so as to make their consideration in a written opinion necessary.

The one material to be considered relates to the question of interest. The Court told the jury it could assess plaintiff's damages, with or without interest, as the jury should see proper, in connection with instructions as to the measure of damages not otherwise complained of. The verdict assessed the damages at \$7,000, with seven years' interest, \$2,940, aggregating \$9,940.

It is objected in the assignment of errors that the charge on this question, and verdict with judgment thereon, are erroneous.

This involves a consideration of the question, What is the true measure of damages for such personal injury?

The rule for determining damages for injuries not resulting in death (where the statute fixes the measure), and not calling for exemplary punishment, deducible from the decisions of this Court since its organization in this State, is that of

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compensation for mental suffering and physical pain, loss of time and expenses incident to the injury, and, if it be permanent, the loss resulting from complete or partial disability in health, mind, or person thereby occasioned. And this is the rule most consonant to reason adopted in other States. 3 Sedgwick on Damages, Sec. 481 *et seq.* (8th Ed.); Am. & Eng. Ency. of Law, Vol. V., p. 40-44, and notes; *Illinois Central Railroad Company v. Read*, 87 Am. Dec., 260.

As this sum in gross includes all the compensation which is requisite to cover pain, suffering, and disability to date of judgment and prospectively beyond, it is intended to be and is the full measure of recovery, and cannot be supplemented by the new element of damages for detention of this sum from the date of the injury. The measure of damages being thus fixed, it is expected that in determining it juries and Courts will make the sum given in gross a fair and just compensation, and one in full of amount proper to be given when rendered, whether soon or late after the injury; as if given soon it looks to continuing suffering and disability, just as when given late it includes that of the past. It is obvious that damages could not be given for pain and suffering and disability experienced on the very day of trial, and then interest added for years before. These are items considered to make up the aggregate then due and the gross sum then for the first time judicially ascertained.

The error of the Court below was in the assumption that a like measure of damages is applied in this class of cases as in that of injury to property effecting its destruction or conversion, or other unlawful or fraudulent misappropriation or detention of property or money, in which the rule applied by the Circuit Judge is held to be a proper one, not on the theory, even in this class of cases, that interest as such is due, but that the plaintiff is entitled to the fixed sum of money or definite money value of property converted or destroyed, and the jury may give *as damages* an amount equal to interest on the value of the property. But such rule applies alone to such cases, and not to that of personal injury, which does not cease when inflicted and is not susceptible of definite and accurate computation. It never creates a debt nor becomes one until it is judicially ascertained and determined. Only from that time can it draw interest, and interest as damages cannot, at any preceding time be added to it without changing and superadding a new element—never given in this State or any other in a similar case, so far as our investigation has discovered.

The counsel of plaintiff, who cite many authorities supposed to be in support of the ruling below, were doubtless misled by the generality of terms used in some of them. Under the head of "interest," after stating that "it was generally allowed by law on two grounds, namely, on contract ex-

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pressed or implied, or by way of damages either for default in payment of a debt or for a use or benefit derived from the money of another," it is stated in the Am. & Eng. Ency. of Law, Vol. II., that "where it is imposed to punish tortious, negligent, or fraudulent conduct, it is a question within the discretion of the jury." Page 380.

For this proposition various authorities are cited, including Mr. Sedgwick on Damages, page 374 (the reference being to paging of the fifth or earlier edition). This author uses similar general terms, but neither was speaking of cases of personal injury, but of the class of cases to which we have referred, as fully appears from Mr. Sedgwick's further discussion of this general head on pages 385, 386, and as most clearly appears from a reference to the authorities cited by both, which relate to cases of trover and trespass, and to property controversies only.

In neither of these books is the proposition now thought to be sustained by them advanced—that the measure of damages for a personal injury includes damages for detention of the supposed amount due.

The generality of statement indulged in that and former editions of this work is corrected by editors of the last edition. Chapter 10 of the first volume of this edition is devoted to interest allowed in actions where it is by rule of law, or in the discretion of the jury or Court trying the case, allowed as part of the measure of damages.

In these cases are enumerated and discussed those actions sounding in tort in which interest may be given as damages. The distinction is there taken as taken here, and actions for personal injuries excluded because of the existence of a wholly different measure of damages respecting them. In this connection we quote Section 320 in the volume and chapter referred to:

"It sufficiently appears from what has already been said that there is no general principle which prevents the recovery of interest in actions of tort. The fact that the demand is unliquidated has been shown to be insufficient to exclude interest, and there is nothing in the mere form of the action which renders it unreasonable that interest should be given. Nevertheless, it is in the region of tort that we find the clearest cases for disallowance of interest. There are many cases which are not brought to recover a sum of money representing a *property loss* of the plaintiff, and it is frequently said broadly that interest is not allowed in such actions. It is certainly not allowed in such actions as assault and battery, or for personal injury by negligence, libel, slander, seduction," etc.

The measure of damage in such case seems nowhere to include this, or be based upon this idea. Even in respect to injury or destruction of property, where the Supreme Court of the United States has adopted fully the prevailing rule allowing damages in the form of interest on value of the property, the rule has been limited to such injury of property

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or property right as had a fixed or certain value, and it is accordingly held in that Court that indefinite damages, as that resulting from infringement of a patent, could not bear interest until after the amount had been judicially ascertained. *Tilghman v. Proctor*, 125 U. S., 161; Lawyers' Co-op. Ed., Book 19, p. 672.

The direct question we are considering also came before the Supreme Judicial Court of Maine, and it was there held that the rule permitting damages equal to interest on value of property in cases of trespass and trover did not apply, and that interest could not be allowed upon a recovery for personal injury, and that, too, under a statute authorizing a recovery "to the amount of the damage sustained" (this not material, however, as their statute gave no more nor less right than exists here). *Sargent v. Hampden*, 38 Maine, 581.

The cases cited by the editors of the last edition of Sedgwick on Damages, sustaining the proposition that interest cannot be included in a recovery of damages for personal injuries, are from Georgia and Pennsylvania. *Rateree v. Chapman*, 79 Ga., 574; *Western and Atlantic Railroad Company v. Young*, 81 Ga., 397; *Pittsburgh Southern Railway Company v. Taylor*, 104 Pa., 306.

These cases have all been examined, and fully sustain the text.

One of the cases cited to the proposition in the American and English Encyclopedia of Law was a Pennsylvania case earlier than either of those to

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which we have referred. The case there cited (*Fusholt v. Read*, 16 Serg. & R., 266), which we have not been able to find in libraries here, was evidently not one of personal injury, or else not consistent with later holdings of that Court.

Indeed, the Pennsylvania Court seems hardly to have gone as far on that question in reference to allowance of interest as damages in other actions *ex delicto* as other Courts.

In suits for the destruction of property that Court has held that while lapse of time may be looked to, it is error to instruct the jury that plaintiff is entitled to interest on such damage from time it occurred. *Township of Plymouth v. Graves*, 125 Pa., 24; *Emerson v. Schoonmaker*, 135 Pa., 437.

Of the other cases cited in the American and English Encyclopedia of Law we have examined those in 13 Wis., 36 N. Y., and 30 Texas. They all sustain the text as it is intended to be understood and as we have herein explained, and doubtless the other cases do so.

To the same effect are the cases of *Lincoln v. Claffin*, 6 Wall., 132 (Lawyers' Co-op. Ed., Book 19, p. 106); *Dyer v. Nat. St. Nav. Co.*, 118 U. S., 507 (Lawyers' Co-op. Ed., Book 30, p. 153); *United States v. North Carolina*, 136 U. S., 211 (Lawyers' Co-op. Ed., Book 34, p. 336); *Clement v. Spear*, 56 Vermont, 401; and cases from American Decisions and Reports, cited in Rapalje's Digest, Vol. I., pages 1039, 1040, 1041, under heads of "Trover" and

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“When Interest may be Added,” and Vol. II., page 1991, under head of “Interest.” See also 1 Sedgwick, Secs. 432 and 493 (8th Ed.).

The effect and meaning of statements quoted from American and English Encyclopedia of Law, and its reference to Sedgwick on Damages, are made perfectly clear when these cases and authorities herein added are examined and the generality of expressions limited to the purpose of their use and the class of cases being considered. They were not dealing at all, nor intending to be understood as dealing, with the question of recovery for personal injuries, which is itself a recovery of damages pure and simple, and measured by a rule which needs no supplement that would add damages to damages.

The charge and verdict were therefore erroneous on this point, and prejudicial to defendant to the extent, and only to the extent, of the injury. The Circuit Judge might have refused to receive the verdict as to interest, and the same effect may now follow a remitting of the interest by plaintiff if he elects to do so. In that event the plaintiff is entitled to a judgment for the \$7,000, with interest from date of its rendition and cost; and with this modification the judgment will be affirmed. This was the practice adopted in the Maine case on this point, as well as in one of the Pennsylvania cases (135 Pa., 437, citing several others), and is clearly the correct rule.

In default of such remission a new trial will be granted.



## ANDERSON v. RAILROAD.

(Nashville. December 17, 1891.)

1. CORPORATIONS. *Registration of charter. Collateral attack.*

The existence of a railroad company, chartered and organized under the general incorporation Act of 1875, cannot be "collaterally questioned" in any legal proceeding—*e. g.*, in suit to recover subscriptions of stock—after its completed charter has been duly registered in the county where the "principal office" of the corporation is situated, although its charter has not been, as required by the Act, registered in other counties traversed by the proposed line of road.

Acts construed: Acts 1875, Ch. 142.

Case cited and approved: *Brewer v. State*, 7 Lea, 682.

2. SAME. *Same. Location of principal office.*

The "principal office" of a corporation is located in that county where the incorporators elect to have their charter first registered and perfected, within the meaning of the requirement of the Act of 1875, that the charter "is to be registered in the county where the principal office of the company is situated."

Acts construed: Acts 1875, Ch. 142.

3. SAME. *Same. Amended charter.*

An amended charter is void, in like manner as an original charter, if it has not been registered as required by Act of 1875 in the office of the Secretary of State.

Acts construed: Acts 1875, Ch. 142; Acts 1883, Ch. 163.

Case cited and approved: *Brewer v. State*, 7 Lea, 682.

4. SAME. *Stockholders' liability for their subscriptions. Conditional contract.*

There is ordinarily an implied condition in every contract of subscription to the initiatory stock of a corporation that the subscriber shall not be required to pay his subscription unless the entire capital stock, as fixed, is taken.

Case cited and approved: *Read v. Memphis Gas Co.*, 9 Heis., 545.

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5. SAME. *Same. Waiver of condition.*

But this implied condition may be waived, or expressly provided against.

It is waived, although it had originally attached, where the subscribers to the stock of a railroad company consented to pay their subscriptions before the entire capital stock was taken, in order that a portion of the proposed line of road might be put in course of construction, and this was accordingly done upon the faith of their unconditional promise to pay.

6. SAME. *Same. Estoppel.*

And subscribers, thus waiving this implied condition and consenting to pay their subscriptions unconditionally, are estopped, after the work has been contracted and performed upon the faith of their promise, to contest their liability upon the ground that the enterprise as a whole has failed for want of adequate funds to carry it out, and that their expectations had thus been wholly disappointed.

7. CHANCERY PRACTICE. *Bill of exceptions necessary, when.*

Evidence excluded by the Chancellor upon the hearing of a cause, ceases to be part of the record until restored by proper bill of exceptions.

Cases cited and approved: *Steele v. Frierson*, 85 Tenn., 430; *Aymett v. Butler*, 8 Lea, 453.

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FROM SUMNER.

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Appeal from Chancery Court of Sumner County.  
W. C. DISMUKES, Sp. Ch.

J. J. TURNER for Anderson.

GEORGE W. BODDIE and C. R. HEAD for Railroad.

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LURTON, J. A number of subscribers to the original stock of the defendant company have joined in filing this bill for the purpose of enjoining suits at law upon their several contracts of subscription.

The corporation, expressly waiving all questions of jurisdiction, answers and submits the liability of complainants to the judgment of the Court, and by cross-bill seeks a recovery against each of them.

The learned Chancellor was of opinion that no liability existed, and perpetually enjoined suits at law and dismissed the cross-bill. In support of this decree a number of propositions have been urged.

*First.*—It is insisted that the defendant company has no legal existence, because its charter has not been registered in the several counties through which it is authorized to construct and operate a line of railway.

The charter of the defendant company was obtained under the general incorporation Act of 1875. It was granted in 1883, and, as recited in the written parts, was “for the purpose of constructing a railway from the town of Gallatin, in the county of Sumner, to the city of Knoxville, in the county of Knox, through the counties of Sumner, Trousdale, Smith, Putnam, DeKalb, White, Cumberland, Roane, and Knox, over the most direct and practical route between the said termini.” This charter, after registration in Sumner, was transmitted to the Secretary of State, who affixed his certificate of registration in his office and the

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great seal of State. This certificate, together with the great seal, was subsequently registered in the county of original registration. Whether there has been any registration in any of the other counties in the projected line of road is on the record left in doubt. Complainants insist that until registration in these other counties, and particularly in the county of Troups, where work has been begun and where directors' meetings have been latterly held, that the company has no valid corporate existence.

By Section 26 of the Act of 1875 it is required that the charter shall be registered in the office of the county where the principal office of the company is situated; that it shall then be transmitted to the Secretary of State, who shall affix his certificate of registration, together with the great seal of State, and that these shall be likewise registered "where said instrument was originally registered." This section then declares that this registration shall complete the formation of the company as a body-politic, and the validity of the same in any legal proceeding shall not be collaterally questioned.

When these conditions of existence have been fulfilled as required, and not before, can the corporation rely upon its exemption from collateral attack. *Brewer v. State*, 7 Lea, 682.

All of this was done in this case. We must take the registration in the first instance as a corporate determination of the location of its

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“principal office.” Registration in the county where its principal office is situated completes its identity as a corporation. It is true that by a subsequent clause in the same section it is provided “that if the corporation establishes agencies in any other county or counties, the instrument must be also registered in said county.” Failure to comply with this provision may subject the corporation to a proceeding by the State for a forfeiture, but its corporate existence cannot be collaterally questioned after registration in the county of its principal office. Complainants are not in a situation to make any question as to the failure to register in Trousdale County. It is shown that after they had subscribed, that the meetings of the directors and stockholders were held at Hartsville. This cannot change the fact that the incorporators determined Sumner County to be the location of the principal office. The subsequent opening of an office in that county, or the removal of the principal office, if permissible, cannot affect the charter acquired by the registration in Sumner.

*Second.*—The capital stock was fixed by the incorporators, at a meeting held for purposes of organization, at three millions of dollars. Something less than \$50,000 of this had been taken when this bill was filed. Complainants’ contention is, that until the whole of the stock is taken they cannot be made liable for calls on their subscription.

It is well settled that there is an implied condition that the amount of stock specified in the

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charter, articles of association, or contract of subscription, or fixed by the corporators when authorized to settle same, shall be actually taken before the subscribers shall become liable. *Read v. Memphis Gas Co.*, 9 Heis., 545; Morawetz on Private Corporations, Sec. 156; Beach on Private Corporations, Sec. 535.

This implication may, however, be rebutted by the terms of the charter, or the provisions of the enabling Act, articles of association, action of stockholders or corporators fixing capital, or by the conditions of the contract of subscription. So a subscriber may waive such condition, and this waiver may be either express or implied. A waiver will generally be implied if the subscriber consents to the letting of contracts, the creation of debt, or the doing of any corporate act involving the necessity of calling in the subscribed stock, unless the charter expressly forbid the doing of any corporate act until the requisite capital is taken. Morawetz on Private Corporations, Sec. 156; Beach on Private Corporations, Sec. 535, and authorities cited.

There is nothing in the charter, or resolution fixing amount of capital stock, or in the original contract of subscription, rebutting the usual implied condition and taking their contract of subscription out of the general rule of law. But after the original subscription had been made, a majority of the subscribers entered into the following agreement:

“For the purpose of enabling the Middle and

East Tennessee Central Railroad Company to put their road under construction from the Chesapeake and Nashville Railroad to Hartsville, Tenn., the undersigned subscribers to the capital stock of the said Middle and East Tennessee Central Railroad Company agree that they will pay their said subscriptions as fast as the work progresses; provided, that not more than twenty-five per cent. shall be called for in any one month."

Upon the faith of this agreement the directors let out a contract for the construction of the very part of the projected line contemplated by this agreement, being eleven and one-half miles, and covering the route between the Chesapeake and Nashville road and the town of Hartsville. The contractors were shown this supplementary agreement, and upon the faith of it accepted a contract to construct so much of the road as was agreed to by that paper, and had completed about seventy per cent. of the work when this suit was begun. The obvious effect of assenting to this agreement was to waive the implied condition that the whole of the stock should be raised, and was an undoubted agreement that the work should begin at the Chesapeake and Nashville Railroad instead of the town of Gallatin. Some of complainants did not sign this agreement, and are not shown to have assented, by votes or otherwise, to the commencement of work or the creation of debt. There is proof that at a meeting of subscribers it was unanimously resolved that the directors should let

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out a contract for that part of the line between Gallatin and Carthage; but it is not shown that the complainants, who failed or refused to sign the agreement above set out, in any way participated in this meeting, or that their stock was represented. We therefore decide that such of complainants as did not sign the agreement assenting to the beginning of work between the Chesapeake and Nashville Railroad and the village of Hartsville are not now liable to have their stock called. The remainder of complainants have expressly agreed to the beginning of construction, and to the payment of their stock as work progressed, and as to them this implied condition has been waived. . .

*Third.*—Certain other positions remain to be considered as to those of complainants who have waived the condition that the full capital stock should be raised.

It is said the defendant company is now insolvent, and that the original scheme for a route from Gallatin to Knoxville cannot be carried out, and that the enterprise has been dwarfed to a short link, beginning eight and one-half miles from Gallatin and terminating at Hartsville. It is urged that the charter provided for a road beginning at Gallatin, and not at a point on the Chesapeake and Nashville road eight and one-half miles from Gallatin, and that it should terminate at Knoxville, and not at the town of Hartsville; that complainants are business men and property owners in



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Gallatin, and that the scheme into which they entered contemplated a great through road passing through the coal-fields of the Cumberland Mountains, and connecting their city with other lines of railway, and with the flourishing city of Knoxville. They further insist that, to procure their subscription, the officers and agents of the company represented that no call would be made upon their subscriptions until the company had secured a contract whereby if it should build to Carthage it could consolidate with a road thence to Knoxville to be built by & Mr. Crawford, and that no call should be made until the Chesapeake and Nashville road was constructed into Nashville, and a running arrangement made by which the trains of the defendant company should be carried into Nashville over the tracks of the Chesapeake and Nashville; that none of these things have been done, or are now possible; and that, therefore, they should not be held liable. The company, for answer to the objection as to the beginning point of the road under construction, interpose an alleged amendment to the charter fixing the beginning point at the Chesapeake and Nashville Railroad near Gallatin. This amendment was obtained in 1884, upon application of the directors as provided by the Act of 1875 as amended by the Act of 1883, Chapter 163. It was duly registered in Sumner County, but appears never to have been registered with the Secretary of State. This neglect makes the amendment, even if otherwise valid,

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ineffectual and void. An amendment must be registered as the original, and, until this is done, is subject to the same objection which renders void a defectively registered charter. *Brewer v. State*, 7 Lea, 682.

Another amendment was obtained pending this suit, changing the termini to the Chesapeake and Nashville Railroad near Gallatin and the town of Carthage, in Smith County. This amendment seems to have been in all respects properly registered. By it the capital stock was reduced to \$350,000. This reduction does not help the case, inasmuch as it is not shown that even this has been taken, to say nothing of other objections not necessary to consider. Without passing upon the validity of this second amendment, we are of opinion that, whether valid or invalid, the complainants are estopped to question their liability as subscribers. They expressly agreed that, to enable the company to put under construction the line between the Chesapeake and Nashville Railroad and town of Hartsville, they would pay their subscriptions as that work progressed, in calls of twenty-five per cent. monthly.

It is too late now to say that the line has not been begun at Gallatin, or that it cannot be carried beyond Hartsville. We know of no reason why this company might not have begun the work of construction at any point on the line between Gallatin and Knoxville. If its finances should prove insufficient to connect the part so constructed

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with the charter termini, this ought not in law or equity relieve the subscribers who assented to the beginning of so great an enterprise upon so insufficient a capital.

The representations made to induce subscriptions were all made antecedent to the written contract of subscription, and upon this ground, as tending to contradict the written contract, were excluded. This ruling was doubtless correct; but, however this may be, the excluded evidence is not properly a part of the record before us.

When evidence offered in a chancery cause is excluded upon objection, the correctness of the ruling cannot be challenged upon appeal unless the excluded evidence be made a part of the record by bill of exceptions. This has been repeatedly so ruled. *Steele v. Frierson*, 85 Tenn., 430; *Aymett v. Butler*, 8 Lea, 453.

There is a paper in the transcript styled a bill of exceptions. But this is not signed by the Chancellor as a bill of exceptions. Whether it be a memorandum on a deposition or a decree interlocutory does not appear. But, however this may be, it does not purport to make the excluded evidence a part of the record, and simply recites that certain questions and answers referred to by numbers were objected to and excluded. At most, this can only operate to exclude and not include this evidence.

The decree of the Chancellor must be reversed as to all of the complainants except Anderson,

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Miller, and Thompson. As to them it will be modified so as to enjoin suits at law until the capital stock settled by the corporators has been raised. The original bill will be dismissed as to all of the other complainants. The railway company, under its cross-bill, will take a decree, in accordance with the prayer of that pleading, against each defendant thereto save Anderson, Miller, and Thompson, for the amount of their several subscriptions alleged to be due and unpaid, with interest from filing of cross-bill. One-third of the costs will be paid by defendant railway company, and remainder by defendants to cross-bill against whom decrees are rendered.

## RAILROAD v. NORTHINGTON.

(Nashville. December 19, 1891.)

1. NEGLIGENCE. *Proof of.*

The proof makes out a *prima facie* case of negligence, where it is shown that plaintiff's intestate, while in the employ of the defendant railroad company working as a track hand under the immediate orders and supervision of a foreman or section-boss, sustained injuries by reason of being thrown against the lever of a moving hand-car, in consequence of a collision between a box negligently arranged on the hand-car by the foreman, and the platform of a depot.

2. SAME. *Burden of proof.*

The burden is upon the defendant company to rebut the inference of negligence fairly deducible from these facts.

Case cited and approved: 13 Peters, 181.

3. SAME. *Charge of Court as to cause of death.*

In suit for *death* caused by negligence there was proof of deceased's injury by defendant's negligence, and that he died about one month thereafter. There was evidence tending to show that the death resulted from this injury, and other evidence tending to show that it resulted from independent pre-existing disease.

*Held:* It was not error for Court to charge, upon these facts, that defendant was liable if the death resulted from the injury, but not liable if it resulted from the disease; and that the injury must be deemed the cause of the death, if, co-operating with the disease, it hastened the death, but not, if it merely aggravated the disease without hastening death.

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Cases cited: *Fisher v. State*, 10 Lea, 156; 25 Am. & Eng. R. Cases, 327; 18 *Id.*, 220; 50 Mich., 163.

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FROM MONTGOMERY.

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Appeal in error from Circuit Court of Montgomery County. A. H. MUNFORD, J.

WEST & BURNEY for Railroad.

LEECH & SAVAGE and THOS. L. YANCEY for Northington.

SNODGRASS, J. The defendant in error sued and obtained a verdict for \$5,000 damages of the Louisville and Nashville Railroad Company for the negligent killing of her husband. Pending motion for a new trial, \$2,000 of this amount was remitted, and judgment was rendered for the plaintiff for \$3,000. The railroad company appealed.

Several errors are assigned, the first being that there was no evidence of negligence. The accident occurred on a hand-car running from a point north of Hampton Station, in Montgomery County, to a point south of said station, where the hands using the car were to resume work after dinner,

this being just before. The foreman in charge of the work ordered the men (of whom Henderson Northington, husband of plaintiff, was one) to get on the hand-car and go to the place indicated. They did get on and set out for it, pushing before them a truck or push-car containing two dump-beds or boxes, as was the custom in such removals from place to place for work. These were empty, and there was no way to fasten them. The foreman stood upon them, with a foot in each, thus holding them on. The hands rode on the car and worked the levers propelling it. In attempting to pass the station platform one of these boxes struck it and was thrown under the car, stopping it suddenly. This threw deceased against the lever and injured his right side. Of this injury it is claimed he died.

This, of itself, made out a case of negligence. If the foreman allowed the boxes to be so placed as to strike a platform on the road and bring about this injury, it devolved upon the company to show that it was unavoidable, or not the result of negligence; but, in addition to this, it is proven that the foreman said at the time of the accident that he saw the dump box had slipped or was slipping, but did not think it would strike the platform, thus letting the men, without warning, take the risk of a danger he foresaw and speculated about. The argument for the company is that the proof fails to show that the foreman could have prevented the box slipping, or that it

did not slip suddenly when the car passed over a point in the rails at the place of the wreck.

The car having struck, or dump-box thereon having struck, the platform, this was a circumstance showing negligence (as the overturned coach in *Stokes v. Salstonstall*, 13 Peters, 181), and made out a *prima facie* case, which it devolved upon defendant to meet. This it not only did not do, but predicates its reliance for reversal on weakness of plaintiff's additional affirmative evidence of negligence. It was the duty of the foreman representing the company to see that it was so placed that it would not strike the platform naturally; and when it did strike, it then devolved upon the company to show that this was not the result of any negligence. The *onus* was not upon the plaintiff to show why it struck, after having shown that it did strike. The reason, if there were any proper one therefor, should have been shown by the defendant, to remove the presumption of negligence arising from the fact of collision. The case referred to in 13 Peters has been often followed in this State.

The remaining error to be noticed in the number assigned is that on the qualification of a proposition submitted by defendant to the Court as instruction to the jury.

Though the plaintiff's intestate died about a month after the injury, and there was evidence to sustain the theory that his death was the direct result thereof, there was evidence tending



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to show that he died of galloping consumption, of which he was probably, though not very visibly, affected when injured.

In this condition of the evidence the Court was asked to charge as follows: "If you find that the company was negligent, and deceased was injured by such negligence, then, did the injury cause his death or did he die of some disease? If he died of the injury—and by that is meant the injury produced the death, or produced a disease which resulted in death, or so weakened the powers of deceased as rendered him unable to resist a disease of which he might otherwise have recovered, or with which he might have lived an indefinite time—then plaintiff should recover. But if deceased already had a fatal disease, from which there was no hope of recovery, and his death was inevitable from that disease in a short time, and the injury was slight and of such a character as to simply aggravate the disease, and he died of the disease and not of the injury, then plaintiff cannot recover at all, for this is a suit for the death of deceased."

The Court gave this instruction to the jury, with this addition: "This is the law, but if the death was hastened or occurred sooner by reason of the injury than it otherwise would, then the injury was the cause of the death."

It is objected that the addition of the Court to the request submitted is not the law; and a case to the contrary in terms, if not in effect, as to

“hastening” the death, is cited in 25 American and English Railroad Cases, 327. The case is from Missouri, and is that of *Jackson v. The St. Louis, Iron Mountain and Southern Railroad Company*. There the evidence showed that a mortally wounded man had been suffered to be placed upon a train and removed from the place where he was injured, under circumstances of at least slight negligence on the part of the conductor. The Court charged that “if the conductor was informed of the condition of the wounded man, and knew he was being taken against his will, and consent of plaintiff (his wife), and that he was so taken and transported from Dexter to Clay County, thereby causing or hastening his death, the jury should find for plaintiff.” He further refused, on request of defendant, to charge “that if the wrongful act only hastened the death of Jackson, and was not the cause of same, you must find for defendant.”

The Supreme Court of Missouri, on appeal, held that the giving of the first and refusal of second instruction quoted was error.

Under the facts of that case, with the brief and summary propositions standing as they do, the case may be right—it is not necessary to determine that question—but the charge we have here is not the same. It presents in the proposition submitted by the Circuit Judge all the qualifications which make the use of the term “hastened” objectionable in the Missouri case. He had already said that “if the injury was

slight, and of such a character as to simply aggravate the disease, and he died of the disease and not of the injury, then plaintiff cannot recover." He now adds, "but if the death was hastened or occurred sooner by reason of the injury"—in other words, if the death was hastened or occurred by reason of the injury, and sooner than deceased would have died of the disease, then the injury was the cause of the death—that is, of the death when it occurred at another and different time than death would have occurred from the disease. This must be true, or there could be no cause of an earlier death than that which, nothing else intervening, would have produced a later one.

A man might be suffering from an incurable disease, or a mortal wound, with only two days to live when a negligent wrong-doer inflicted upon him an injury which in his condition of debility took his life or developed agencies which destroyed him in one day, and yet the latter wrong be in a legal sense the cause of his death, though it only hastened that which on the next day would have inevitably happened.

We think the proposition submitted by counsel, and qualified by the wise and judicious view of the Court, an admirable statement of the true rule on this very delicate question. The Supreme Court of Missouri said it found no precedent for the decision made in the Jackson case, and there are, confessedly, few reported cases that touch upon the question. Those supposed to present an an-

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Railroad v. Northington.

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tagonistic view are embodied and cited in 1 Sedgwick on Damages, 160 (8th Ed.); *Railroad Co. v. Kemp*, 18 American and English Railroad Cases, 220; *Beauchamp, Adm'r, v. Mining Co.*, 50 Mich., 163. And to the same effect is the assumption (for the point did not exactly arise for decision) in this State in the case of *Fisher v. State*, 10 Lea, 156.

It is sufficient for the purpose of this opinion to say that, treating it from the stand-point of an original proposition, we are entirely content with the view of it embodied in the instruction submitted, as qualified by the Court upon the facts of this case. That qualification upon the proposition put, removed here in fact, and will remove hereafter in precedent, all danger that this case will be authority or treated as authority for holding that any slight aggravation of a disease is a "cause of death within the meaning of the statute." The Circuit Judge had already charged upon the propriety of reducing damages according to the expectation of life, and had justly exercised his judgment and discretion in requiring a remission, if the judgment was to stand, there being no grossly negligent or wanton conduct in bringing about the injury.

We are satisfied with the judgment, and it is affirmed with cost.

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Vaughn v. Herndon.

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## VAUGHN v. HERNDON.

(Nashville. December 19, 1891.)

1. BOARDS OF TRADE. *Charter and by-laws of approved.*

The charter of the Clarksville Tobacco Board of Trade, issued under the general incorporation law of 1875, and the by-laws adopted by that institution pursuant to its charter, authorizing and requiring the settlement of business differences among its members by committees of arbitration appointed for that purpose, is approved by the Court as "wise legislation, that will operate to prevent much needless and expensive litigation, as well as promote the welfare of commerce, if correctly enforced."

Act construed: Acts 1875, Ch. 142.

2. ARBITRATION AND AWARD. *By committees of boards of trade binding.*

And the final award of the constituted committees of arbitration duly appointed by such board of trade upon matters of dispute within their jurisdiction, if fairly made, is conclusive upon the parties.

3. SAME. *Same. Rejection of evidence.*

And the rejection, upon reasonable grounds, of evidence offered before the committee affords no just ground of complaint against the award. The committee must, of necessity, determine as to the competency and weight of the evidence.

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FROM MONTGOMERY.

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Appeal in error from Circuit Court of Montgomery County. A. H. MUNFORD, J.

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Vaughn v. Herndon.

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LEECH & SAVAGE for Vaughn.

WM. M. DANIEL for Herndon.

TURNEY, Ch. J. The Clarksville Tobacco Board of Trade was chartered by Section 1, Chapter 142, Acts of 1875. Pursuant to its powers the board adopted by-laws. Among them:

"SEC. 10. That in addition to the officers of the board, the following standing committees shall be appointed and elected:

"The president shall appoint every month a committee of arbitration consisting of two members, one of whom shall be a warehouseman, the other a buyer; these two shall select a third person, to whom shall be referred all questions of dispute between members in regard to tobacco matters, and all questions of claims for damages upon hogsheads of tobacco claimed or supposed to be unfairly sampled. This committee shall have power to order resamples of said disputed hogsheads, or to employ some responsible person to superintend said resampling, whether here, in New York, Baltimore, New Orleans, or any foreign markets, if they have just reason to believe that the unfair representation of the hogshead did not occur in the sample drawn in this market—or shall order back the hogshead to Clarksville for examination, upon written demand of the seller of the same.

"If the buyer's claim is substantiated, the seller shall pay the assessed damages and all expenses

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Vaughn v. Herndon.

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accruing from the error, including express or freight charges, and expenses for resampling. If the claim proves unfounded in justice, the buyer shall bear all expenses as above. No trivial claims, or claims unfounded in justice, shall be entertained or acted upon by the committee.

"SEC. 11. The board shall, at their annual meeting, or as soon thereafter as possible, elect to serve until the first of November following a committee of appeal, consisting of five members, one of whom shall be one of the vice-presidents of the board, who shall act as chairman of said committee. To this committee any member or members may appeal who may feel aggrieved or injured by any decision of the committee of arbitration. Three members shall constitute a quorum of this committee, though all five shall meet upon written request of either of the disputants. The committee of appeal shall have power to confirm the decision of the committee of arbitration, or to reverse the same, and make new decision on the matter in dispute, and shall have all the powers granted to the committee of arbitration.

"All decisions of the committee of appeal shall be considered final, and must be followed by prompt settlement by the losing party.

"Should the losing party appeal to the Courts of law or equity, against the decision of the committee of appeal, then said decision shall be sustained by the whole Tobacco Board of Trade to the extent of all the funds in the treasury and

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an assessment upon each member, not exceeding ten dollars per annum.

"SEC. 12. If any member of the committee of arbitration should be interested, either as buyer or seller, in any claim presented before it, he shall notify the president, who shall appoint another member to take his place on the committee of arbitration to act on said claim; and should any member of the committee of appeal find that he is interested in the claim presented before it, or if he should have happened to have been on the committee of arbitration which acted on said claim, he shall notify the president, who shall appoint some other member to act in his place on said claim."

In August, 1890, plaintiffs bought a hogshead of tobacco from the Grange Warehouse, at Clarksville. Claiming that the sample did not properly represent the tobacco, they made demand for reclamation for the loss, sending back from Louisville, Ky., the sample by which they had purchased, and also a sample said to have been taken from the hogshead of tobacco by Inspector Green. The latter sample was tied by a string and without an inspector's seal, but was accompanied by the inspector's certificate. These were put before the arbitration committee, who made an allowance. The warehouse appealed to the committee of appeals. That committee gave their judgment as follows:

"The committee refuses to recognize samples



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Vaughn v. Herndon.

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offered for reclamation coming from places or markets provided with a State or board inspector not bearing the inspector's seal. These samples do not bear the seal of the inspector. When reclamations on parts or parcels of hogsheads are claimed, properly sealed samples are required, together with the certificate of the inspector as to quantity."

No application was made for leave to make additional proof or supply the want in that offered.

The judgment of the committee of appeals was a dismissal of the claims for want of proof to sustain it.

The matter remained in this condition from September 17, 1889, to January 24, 1890, when this suit was brought.

The action of the committee was authorized by the charter and by-laws of the corporation, and was an arbitration of the matters in dispute, submitted to it by the parties in interest, and, so far as this record discloses, was conducted with fairness and in good faith.

The tribunal was necessarily judge of the competency and value of the evidence offered. Its ruling was proper, and in the interest of honesty and fair dealing. It was right to hold that testimony tendered for its consideration should bear such marks of authenticity as would entitle it to *prima facie* credit.

The provisions of the charter and the by-laws thereunder are wise legislation, and will operate to prevent much needless and expensive litigation, as

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Vaughn v. Herndon.

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well as promote the welfare of commerce, if correctly enforced.

The Circuit Court held the parties bound by the award.

The judgment is affirmed.

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Pitt, Adm'r, v. Poole.

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PITT, Adm'r, v. POOLE.

(Nashville. December 22, 1891.)

1. FRAUDULENT CONVEYANCE. *Impeachment of by grantor's administrator. Proof of debts essential.*

In administrator's suit, brought after suggestion of insolvency of estate, to set aside his intestate's fraudulent conveyance of lands, and subject them to payment of debts, if the existence of indebtedness is denied, the complainant is not entitled to relief unless he shows, by satisfactory evidence, that there are subsisting and unpaid debts against the estate.

Code construed: § 3241 (M. & V.); § 2395 (T. & S.).

Cases cited: Boxley v. McKay, 4 Sneed, 289; Spencer v. Armstrong, 12 Heis., 707; Armstrong v. Croft, 3 Lea, 191; Lassiter v. Cole, 8 Hum., 621.

2. SAME. *Same. Same.*

And if the conveyance was not fraudulent in fact, but merely voluntary, then it is essential that complainant prove the existence of the debts not only at the intestate's death, but also at date of the deed.

3. SAME. *Same. Same.*

It is not sufficient proof of the existence of debts in such suit, without more, for the administrator to state in his deposition that "there has been filed with me as administrator \* \* \* claims to the amount of \$1,803.90, all of which are correct so far as I am able to judge."

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FROM MONTGOMERY.

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Appeal from Chancery Court of Montgomery  
County. JORDAN STOKES, Sp. Ch.

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Pitt, Adm'r, v. Poole.

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LEECH & SAVAGE for Pitt, Adm'r.

WM. M. DANIEL for Poole.

LURTON, J. Complainant, as administrator, files this bill to reach certain real estate, and subject same to the satisfaction of the debts of his intestate, upon the ground that it had been conveyed by the decedent in fraud of his creditors. The bill charges that the insolvency of the estate had been suggested; that the personal property which has come to his hands has been sold, realizing only some five hundred dollars; that the debts of the intestate amount to about eighteen hundred dollars, "about all of which has been filed with complainant." It then alleges that his intestate had, in fraud of his creditors, conveyed the property in question to the defendant, who was his sister; that "at the time of this conveyance said intestate was indebted to the above amount, and to the same parties \* \* \* and was wholly insolvent, and so known to be to defendant, A. R. Poole, and that said conveyance was made to defeat and defraud creditors, and so known to defendant, and was in fact without any consideration whatever, though the deed recites one of five hundred dollars."

Defendant demurred and answered. In her answer she denies all of the material allegations of the bill, and especially that her brother, the intestate, owed any debts at his death, and calls

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Pitt, Adm'r, v. Poole.

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for proof of same. She denies that the conveyance was fraudulent or without consideration. The effect of this answer was to put the complainant to the proof of every allegation necessary to make out his case. For the purposes of this case it may be assumed that complainant's proof does show that the conveyance was a voluntary one, intended to secure to a dependent and widowed sister, with a large family, a small home.

The proof shows that this conveyance was made about one week before the death of the intestate. There is, however, no proof that at the time of the conveyance the grantor was indebted to *any* extent. The allegation of the bill that he was indebted to insolvency at the time of the conveyance is therefore not established. Neither is there any sufficient proof of the existence of debt at decedent's death. The only proof offered to establish indebtedness is that of complainant himself, who states in his deposition that "there has been filed with me, as administrator of B. F. Madule, claims to the amount of \$1,803.90, all of which are correct, so far as I am able to judge."

At the common law an administrator could not impeach the conveyances of his intestate. He was regarded as the representative of the intestate and estopped by his deed. 8 Hum., 621. But by the Code, §3241 (M. & V.), an action is given to an executor or administrator "as the representative of the creditors of an insolvent estate," to subject property by bill which had been

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fraudulently conveyed, the proceeds to be distributed *pro rata* among the creditors. It has been held that to sustain such a bill it was essential that it should show that the insolvency of the estate had been already suggested. *Boxley v. McKay*, 4 Sneed, 289.

The right of a creditor of a deceased debtor to file a bill and subject property fraudulently conveyed does not depend on this statute. Such a creditor may maintain his bill against a fraudulent vendee without a judgment against his debtor or his representative, and without joining the administrator as a party. *Spencer v. Armstrong*, 12 Heis., 707; *Armstrong v. Croft*, 3 Lea, 191.

But when an administrator under this statute files a bill against such a vendee, he does so as the representative of the creditors, and he must show that there are such creditors whom he may represent. It is not enough to show that claims have been filed with him, and that, so far as he knows, they are correct. The defendant has a right to contest the existence of creditors entitled to be represented by the administrator, and when this fact is put in issue by a denial of an allegation to that effect, the burden is upon the complainant to establish by competent evidence this essential fact to a recovery. If claims had been reduced to judgment, or allowed by the clerk of the County Court as uncontested, this might be sufficient. But that claims have been filed with an administrator, correct, "so far as he can judge,"

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Pitt, Adm'r, v. Poole.

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is not' enough where the existence of valid debts is disputed. Neither can complainant recover without showing indebtedness at date of conveyance. That at date of intestate's death he was indebted is not enough; *non constat* that this indebtedness was not made after the conveyance.

Complainant's proof does not support his case. The decree of the Chancellor must be reversed and the bill dismissed.

## LENEAVE v. McDOWELL.

(Nashville. January 5, 1892.)

1. ASSIGNMENT. *Assignor's liability upon conditional guaranty or warranty.*

The assignor's liability under contract of assignment of a non-negotiable chose in action will be enforced by the Courts with such conditions and limitations as the parties themselves have agreed upon; and if that liability is made dependent by the contract, express or implied, of the parties; upon the exercise of due diligence on the part of the assignee in enforcing collection of the chose in action, there can be no recovery by the assignee against the assignor for any loss sustained unless such diligence is shown, or sufficient excuse for the neglect.

Cases cited and approved: Tully v. Hodge, 3 Hum., 74; Cates v. Kittrell, 7 Heis., 609; Williams v. Miller, 2 Lea, 409; Jones v. Greenlaw, 6 Cold., 342.

2. SAME. *Same. Case in judgment.*

McD., an attorney, having a declared lien upon his client's land for a \$1,000 fee, agreed, after the client's death, with his executor and infant heirs to accept, in full satisfaction of his fee, a portion of the land and release his lien upon the remainder. It was further stipulated that proper legal steps should be taken to carry out this contract and perfect McD.'s title to this portion of the land. There was pending at date of this agreement a suit involving the title of McD.'s client or his heirs to an undivided seven-eighths of the entire tract. Complainant became owner of McD.'s interest under this contract by an assignment which transferred "all his right, title, claim, and interest in and to said land and fee," with the further stipulation that in the event the assignee failed to get the land, and should also lose all or any part of the \$1,000 fee assigned, then McD. should make up the loss to the extent of \$700 only. McD.'s client and his heirs lost an undivided seven-eighths of the entire land by said suit, and surrendered possession thereof. No steps were ever taken to perfect McD.'s title to the portion taken in satisfaction of his fee. Complainant, without taking any steps whatever to collect said fee, or to enforce the lien upon said land, brought suit against McD. to



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Leneave v. McDowell.

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recover the \$700 under his said warranty. It is not shown that the client's estate is insolvent, or that the remaining one-eighth of the land is insufficient to satisfy this fee.

*Held:* The suit cannot be maintained. McD.'s guaranty was not absolute, but conditional upon the assignee's first taking all proper steps and exercising due diligence to collect the fee and save himself from loss. This fact is not proved.

3. CONDITIONAL RELEASE. *Effect of non-compliance with condition.*

McD. having released his lien upon the remainder of the land, upon consideration and condition that he should be invested with perfect title to a specified portion of the tract, the effect of a failure of this condition was to restore his lien upon his client's interest in the entire tract.

4. STATUTE OF LIMITATIONS. *Administrator's statute does not bar enforcement of liens.*

Although recovery of a debt against an estate is barred by the administrator's statute, the enforcement of a lien upon lands by which the debt is secured is not thereby barred.

Case cited and approved: *Martin v. Neblett*, 86 Tenn., 383.

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FROM MAURY.

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Appeal from Chancery Court of Maury County.  
A. J. ABERNATHY, Ch.

WEBSTER & TAYLOR and HUGHES & HATCHER for  
Leneave.

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Leneave v. McDowell.

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SOUTHALL & SMISER and W. S. FLEMING & SON  
for McDowell.

LURTON, J. The bill alleges the breach of a contract of "warranty and guaranty," contained in an instrument which designates the thing transferred and assigned as an interest "in said fees or land, as the case may be." This assignment is in these words: "This agreement witnesseth: Whereas, by agreement of compromise in the cause of *McDowell and Webster and Cooper et al. v. J. P. Brown* it was agreed that complainants in said bill should have certain therein described lands in full satisfaction of fees in said cause of *J. P. Brown v. H. A. Brown et al.*, the amount of fees being stipulated in said agreement, the said agreement is, by further agreeing thereto, placed in the hands of W. J. Embry. Said agreement is here referred to for description of the land and designation of amount of fees. Now, Thos. L. Porter is desirous of purchasing the interest of *E. C. McDowell in said fees or land, as the case may be.* It is therefore agreed that for the consideration of \$700 said McDowell sells or assigns and conveys to Thos. L. Porter all his right, title, claim, and interest in and to said *land and fee.* In the event the Court does not confirm the sale agreed upon as per agreement in the hands of W. J. Embry, and makes any reduction in the fee therein agreed upon—that is to say, *in the event* said Porter does not get the land therein described, and loses all or

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*any part of the amount of fee agreed upon—the said McDowell warrants and guarantees to said Porter, to the extent of \$700, to make up his proportionate part of said loss.” \* \* \**

The italics are ours. It is manifest that without we look to the paper referred to as being in the hands of W. J. Embry, no intelligent meaning can be attached to this transfer and guaranty. Unfortunately, this has been lost, and for its contents we are compelled to rely upon oral evidence. From this, as well as from other evidence competent as showing the circumstances surrounding the transaction, we gather these facts:

*First.*—E. C. McDowell, the defendant, and others were associated as counsel for John P. Brown in a suit involving the title to some 1,100 acres of land, of the value of from forty to fifty thousand dollars; that a decree was obtained recovering this land for their client, and that a lien was declared in March, 1880, upon 500 acres of this land to secure reasonable attorney's fees.

*Second.*—After this recovery a petition was filed in the same cause by certain non-resident defendants, against whom a decree *pro confesso* had been taken, seeking to re-open the case and to defend the suit upon its merits. Pending this petition, a bill was filed by the gentlemen whose fees were thus secured against J. P. Brown to settle the amount of these fees and to enforce the lien reserved to secure same. Pending this suit, John P. Brown died. After his death, and while

the petition of the non-resident defendants was still pending, the agreement referred to in the assignment above set out was executed and left in possession of Embry, the executor of J. P. Brown, as a mutual depositary.

*Third.*—From the evidence relied upon as showing contents of this lost paper we find that by this paper the fees due to Mr. Brown's counsel for services rendered in original case, and to be rendered in the matter of the pending petition, were fixed at the sum of \$4,000, with some interest added, and that of this sum \$1,000 was due to Defendant McDowell. To pay these fees it was provided by this agreement that one hundred and thirty acres, stated by the witness to have been described in the lost paper, and being a part of the five hundred acres upon which a lien had been declared to secure these fees, should be conveyed to these solicitors in full payment of same. It being conceded, however, that the executor and representatives of John P. Brown did not have power to conclude this arrangement by a conveyance, it was therefore provided that the executor should file a bill in the Chancery Court and obtain a confirmation of this arrangement, and by decree vest title as provided. It was also stipulated that in the event the Court should decline to confirm the agreement by decree passing the title, that then a decree should be obtained ordering a sale of this particular one hundred and thirty acres, and in the latter event the creditors thus provided

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Leneave v. McDowell.

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for agreed to bid their full claims on this parcel in complete exoneration of the estate. As a further part of this plan, it was agreed that the lien upon the five hundred acres should be waived. This latter agreement was manifestly upon consideration that the other parts of the agreement should be carried out.

*Fourth.*—It further appears that no bill was ever filed by the executor as provided, and this plan of settlement was therefore never confirmed or perfected, and the title was never vested as contracted for. It is to be inferred—though as to this there is no direct proof—that complainants, as assignees of McDowell and his associates, went into possession of the parcel contracted for in the way above mentioned, and remained in possession until the termination of the questions made by the non-resident defendants. The result of this petition was that the original decree was set aside and annulled as to these non-residents, and title to seven-eighths of the entire subject-matter in controversy decreed to be in these non-residents. The history of this litigation and its final result is to be found in the case of *Brown v. Brown et al.*; 86 Tenn., 277 *et seq.*

As a consequence of this decision, the executor and devisees of John P. Brown surrendered possession of seven-eighths of the eleven hundred acres in controversy; and in this the complainants, as assignees of McDowell and others, acquiesced, and abandoned without actual eviction their possession

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of the one hundred and thirty acre tract. There being no further possibility of obtaining title to the one hundred and thirty acres, in view of this failure of the John P. Brown title, complainants filed this bill and rest their right of recovery upon the facts we have recited.

The liability of Defendant McDowell must depend upon the construction of the contract of assignment, and arises as a consequence of the legal effect of the words of warranty and guarantee therein. It is clear that the parties contemplated the possibility that title to the one hundred and thirty acres might never be confirmed. The witness who proves the contents of the last agreement concerning settlement of the fees, says that the agreement was drawn with reference to the possible results of the pending effort to re-open the decree upon which the title of the Brown estate depended. That agreement was obviously nothing more than an executory contract for the settlement of the indebtedness of the estate in land, or by the sale of a particular part of the land. To complete it the executor was required to file a bill to obtain proper decrees confirming the arrangement or decreeing a public sale. The agreement waiving or releasing the lien of those fees on five hundred acres was clearly dependent upon the ability of the executor to carry out his part of the agreement. The pendency of the non-resident litigation was doubtless the reason why he failed to file the bill he had agreed to file.

The failure of title made the filing of any such bill after termination of that suit useless. In this view the proposed settlement fell through, and the release of lien fell with it. The interest sold or assigned by McDowell is described as his interest "*in said fee or land as the case may be,*" and in the conveying part of the agreement he assigns and conveys "all his right, title, claim, and interest in and to said land and fee." And when we reach the covenanting part of his assignment, we find that his contract is that "in the event said Porter does not get the land therein described, and loses all or any part of the amount of fee agreed upon, the said McDowell warrants and guarantees to said Porter, to the extent of seven hundred dollars, to make up his proportionate part of such loss." From this we understand that this was but an assignment of the fee of one thousand dollars due to McDowell as agreed to be paid in the last agreement. And that if the agreement therein referred to should fail, and the assignee did not get the land, and should fail to collect the fee, or as much as seven hundred dollars of it, that to the extent of the loss the assignee should be made good. The land he has failed to get. But this very failure revived the claim against the estate for the fee due to McDowell.

The bill neither alleges, nor does the evidence show, any effort to collect this fee from the Brown estate. The Brown title to the 130 acres failed in 1887. This bill was filed in 1890.

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Leneave v. McDowell.

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Though nearly three years elapsed between the adjudication of the Brown title and the bringing of this suit, yet no effort seems to have been made by demand or suit to enforce this claim against the Brown estate. If it be assumed that the statute of limitations had barred a suit for the fee as a debt, yet the lien retained to secure these fees on 500 acres was not barred. *Martin v. Neblett*, 86 Tenn., 383. While seven-eighths of this tract charged with this lien had been lost, yet it does not follow that the remaining one-eighth would not have discharged the claim assigned by McDowell. But complainants' contention is, that the obligation of the defendant is an absolute engagement to repay seven hundred dollars upon failure to get the land, and that it was not incumbent on them to take any steps to collect the fee by suit or otherwise, or to show that the fee cannot be collected. The claim or interest assigned was a non-negotiable chose in action. An assignee of even negotiable paper may so frame his assignment as to protect from liability under any circumstances. So "he may make his liability depend upon other and different conditions than those general rules which govern indorsements of negotiable paper under the law merchant." *Tully v. Hodge*, 3 Hum., 74. If the assignee of negotiable paper may limit or enlarge his liability according to the agreement and intent of the parties, *a fortiori* may the assignee of such a claim and contract as was the subject of this transfer; and



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Leneave v. McDowell.

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such an assignor may make his liability depend upon just such conditions as he may insert in his contract. The principle upon which the cases rest relating to special contracts of guarantee is that all such contracts are to be construed so as to carry out the intention of the parties, the assignor being only bound to the extent of his undertaking. *Cates v. Kittrell*, 7 Heis., 609; *Williams v. Miller*, 2 Lea, 409-414.

This guarantee must be treated as a special and limited contract, and not as an absolute engagement. It is a guarantee against loss of land and fee. That is to say, if the land be lost, and if as much as seven hundred dollars of the fee be not realized, then the guarantor is to make up such loss to the extent necessary to make the sum realized on the fee of one thousand dollars equal to seven hundred. It is a guarantee that he shall realize seven hundred dollars if he shall lose the land and the fee. This guarantee against a specified loss implies an obligation upon the part of the assignee to take such proper steps and use such reasonable diligence as to guard himself against loss. Such an assignee ought to show that the claim has been lost without negligence. This might have been shown by proof of unsuccessful litigation, or by evidence that litigation would have been fruitless. *Jones v. Greenlaw*, 6 Cold., 342; 7 Heis., 609.

Complainants have not even shown a demand upon the representatives of the Brown estate, and

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have contented themselves with evidence as to the loss of the title to seven-eighths of the land which was to have been taken in payment of the fee. They have no legal or moral right to throw this loss upon defendant when they make no showing as to any effort to protect themselves as assignees of this fee against Brown's estate.

Reverse the decree and dismiss the bill with costs.

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Railroad v. Pitt, Adm'r.

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## RAILROAD v. PITT, Adm'r.

(Nashville. January 7, 1892.)

1. NEGLIGENCE. *Erroneous charge.*

In suit against railroad company for the death of an employe, a trackman, killed in the act, averred to have been done under the order of a superior, of alighting from a slowly-moving train, it is error for the Court to refuse, upon defendant's request, to give to the jury the following instruction, there being material evidence of the state of facts therein assumed, viz.: "If you shall find from the proof that the supervisor said to the hands, 'If the train is going slow enough, get off where Hussey is at work; if not, go on over to Faxon and come back on the gravel-train,' and the hands so spoken to were accustomed to getting off and on moving trains, and a discretion was left the hands whether they would jump off or not, then the plaintiff cannot recover on account of the supervisor's order or direction."

2. SAME. *Same.*

And the error of this improper refusal to give this correct instruction as requested, is not cured by the following proposition, itself erroneous, in the general charge, viz.: "If the instructions [of the supervisor] left it to the discretion of the deceased and other hands whether they should get off or not, and the deceased negligently exercised this discretion in attempting to get off at time he did, or in act of getting off, and the negligence of the deceased was the direct cause of his injury, then he cannot recover, and you should so find."

3. DECLARATION. *In administrator's suit for wrongful killing of his intestate, must aver there is widow, children, or next of kin.*

In administrator's suit to recover damages of the party who has unlawfully caused the death of his intestate, there must be an averment in the declaration that the deceased left a widow, or children, or next of kin, for whose benefit the suit is prosecuted.

Code construed: §§ 3130-3132 (M. & V.); §§ 2291, 2292 (T. & S.)

Cases cited and approved: *Webb v. Railway Co.*, 88 Tenn., 119; *Greenlee v. Railroad*, 5 Lea, 418; *Trafford v. Adams Express Co.*,

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Railroad v. Pitt, Adm'r.

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8 Lea, 100; Railroad v. Lilly, 90 Tenn., 563; Evans v. Thompson, 12 Heis., 536.

4. AMENDMENT. *Of declaration after judgment.*

And the omission of this material averment cannot be cured by amendment after judgment, under the statute providing that defects "in matters of form may be rectified and amended" after judgment.

Code construed: § 3583 (M. & V.); § 2872 (T. & S.).

Case cited and approved: Cannon v. Phillips, 2 Sneed, 186.

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FROM MONTGOMERY.

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Appeal in error from Circuit Court of Montgomery County. A. H. MUNFORD, J.

WEST & BURNEY for Railroad.

LEECH & SAVAGE, and G. L. PITT for Pitt, Adm'r.

CALDWELL, J. This is an action by G. L. Pitt, administrator, against the Louisville and Nashville Railroad Company, for having negligently and wrongfully caused the death of his intestate, Newton Sullivan, by requiring him to alight from a moving train.

The defendant pleaded not guilty. On the issue so made the case was tried, resulting in verdict and judgment for \$4,000 in favor of the plaintiff.

Motions for new trial and in arrest of judgment

having been successively made and overruled, the defendant appealed in error.

The deceased was an employe of the defendant, engaged with numerous other hands in "raising" the road-bed near the Tennessee River, at a point between Danville and Faxon. On the day of the accident he and others, in charge of the defendant's supervisor, took passage on a regular passenger-train to Danville, where it was supposed they would find "the gravel-train," which would convey them thence to their work. On reaching Danville it was ascertained that "the gravel-train" was not there, but at Faxon, the next station south; whereupon a conference was held between the supervisor and the conductor of the passenger-train about the further passage of the hands on the latter's train. After this conference the supervisor made some statement to the hands, and they remained aboard until the train reached the place at which they were to perform their labor. There they disembarked while the train was moving slowly. In alighting, Newton Sullivan, plaintiff's intestate, fell, was thrown under the wheels, and so injured that he died in less than an hour. The supervisor was not present at this time, having gotten off the train, as he told the hands he would, about one mile back.

The principal controversy in the Court below, was whether the accident was the result of Sullivan's indiscretion, or of his obedience to an order of the supervisor.

Some of the witnesses testified that the supervisor, after his conference with the conductor, entered the coach and said to the hands: "Boys, the train will slow up at the work, and you will get off and go to work where Mr. Hussey is at work;" while others testified that the supervisor's order was that the hands should get off where Hussey was at work "*if the train should be going slow enough,*" if not, that they should go on to Faxon and return on the gravel-train.

The latter was the defendant's theory of the facts, and upon that theory defendant's counsel requested the Court to instruct the jury as follows:

"If you shall find from the proof that the supervisor said to the hands, 'If the train is going slow enough, get off where Hussey is at work; if not, go on over to Faxon and come back on the gravel-train,' and the hands so spoken to were accustomed to getting off and on moving trains, and a discretion was left the hands whether they would jump off or not, then the plaintiff cannot recover on account of the supervisor's order or direction."

Clearly this was a proper instruction upon a material question in the case, and it should have been given unless embraced in the general charge. On this point the Court told the jury that "if the instructions left it to the discretion of the deceased and other hands whether they should get off or not, and the deceased negligently exercised this discretion in attempting to get off at time he

did, or in act of getting off, and the negligence of the deceased was the direct cause of his injury, then he cannot recover, and you should so find."

This direction of the Court manifestly does not embrace the proposition contained in the instruction requested.

Instead of telling the jury, as requested, that defendant would not be liable if the supervisor's order left the deceased to decide for himself whether or not he would alight at the particular time and place, the Court told them the plaintiff could not recover if the order allowed the deceased such discretion, *and* his *negligent* exercise of that discretion directly caused his injury. The instruction requested exonerated the defendant, if it should be found that the deceased was left to act upon his own discretion, while the charge given made non-liability depend, not upon the allowance of that discretion, but upon the negligent exercise of it. The charge virtually put the character of the supervisor's order out of the case, by making non-liability dependent upon negligence on the part of the deceased; for, of course, the plaintiff could have no recovery if the negligence of deceased was the direct cause of his death. In such case it would be entirely immaterial whether the order was discretionary or mandatory.

It was error, for which a new trial must be awarded, to refuse the instruction requested.

The motion in arrest of judgment was based upon the failure of plaintiff, who sued as adminis-

trator, to aver that his intestate left a widow, child, or next of kin to take the benefit of the recovery sought.

Pending this motion, plaintiff was allowed to amend his declaration by adding an averment that the deceased left a widow, for whose use and benefit the suit was brought, and then the motion was overruled. This action of the Court is assigned as error.

If the averment was necessary to plaintiff's right to maintain his action, the amendment came too late, and should not have been allowed. Only defects "in matters of form may be rectified and amended" after judgment. Code (M. & V.), § 3583; *Cannon v. Phillips*, 2 Sneed, 186.

Was the added averment a necessary one, without which the plaintiff could not legally have a recovery?

The right to maintain an action against one person for wrongfully causing the death of another is purely statutory—given for the benefit of the widow, children, or next of kin of the deceased. The suit may be brought by the beneficiaries in their own right, or by the personal representative for their use and benefit. Code, §§ 3130–3132; *Webb v. Railway Co.*, 4 Pickle, 119; *Greenlee v. Railroad*, 5 Lea, 418; *Trafford v. Adams Express Co.*, 8 Lea, 100.

If there be no widow, child, or next of kin, the suit cannot be maintained at all; for, in such event, the case is without the statute, and the



right of action dies with the injured person, as at the common law. In a recent case so deciding, this Court said: "It is only where there is a widow, child, or next of kin to receive the benefit that the rule of the common law is abrogated; where there are no such kindred to become beneficiaries the statute does not apply, and the right of action abates, now as formerly, with the death of the injured person." *E. T., V. & G. Ry Co. v. Thos. B. Lilly, Adm'r, etc.*, 6 Pickle, 563.

The first rule of good pleading requires the plaintiff to aver such facts as will, under the law, entitle him to recover if the averments be established by proof. This requirement is imperative since the Code, as well as by the common law. *Evans v. Thompson*, 12 Heis., 536.

To authorize a recovery under the statute before us, two facts are essential in every case: First, a wrongful act by the defendant, causing death; secondly, the existence of a widow, child, or next of kin of the deceased, to take the recovery. If either of these facts be wanting the plaintiff must inevitably fail in his action. One fact is as important as the other, and both must be shown before a recovery can be had. Though there be widow, child, or next of kin surviving, the plaintiff must fail, if the injury resulting in death was not caused by the wrongful act of the defendant; for, in that case, the deceased himself had no "right of action." Or, if the death resulted from the wrongful act of the defendant, and the de-

ceased left no widow, child, or next of kin, the plaintiff must as certainly be defeated, because that case would not come within the statute, but would be governed by that rule of the common law by which the right of action dies with the injured person.

The action being maintainable alone under the statute, there can be no recovery unless both the wrongful act and the existence of some beneficiary contemplated by the statute, be proved; and, to be allowable in proof, such facts must first be averred. The averment of the former will not justify proof of both.

The averment of the wrongful act alone does not present a case which, if established by proof, will authorize a judgment in favor of the plaintiff. It does not disclose a *prima facie* right of recovery; therefore, the original declaration in this case was bad. The additional averment that the deceased left a widow, child, or next of kin, was essential to plaintiff's right to maintain the action. Wherever the question has arisen upon statutes similar to our own the Courts have held with unanimity that the declaration is fatally defective unless it avers that the deceased left a widow, child, or next of kin surviving him. Such, at least, is the uniform holding of all the cases we have been able to find. It is the prevailing doctrine in New York, Indiana, Illinois, Minnesota, Vermont, South Carolina, Kansas, and Wisconsin, as will appear from the following cases: *Safford v.*

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 Railroad v. Pitt, Adm'r.
 

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*Drew*, 3 Duer, 627; *Lucas v. N. Y. Central R. R. Co.*, 21 Barbour, 245; *I. R. R. Co. v. Keely's Adm'r*, 23 Ind., 133; *Stewart v. T. H. & I. R. R. Co.*, 103 Ind., 44 (S. C., 21 Am. and Eng. R. R. Cas., 209); *C. & R. I. R. R. Co. v. Morris*, 26 Ill., 400; *Conant v. Griffin*, 48 Ill., 411; *Holton v. Daly*, 106 Ill., 131; *Schwarz v. Judd*, 28 Minn., 371; *Westcott v. C. V. R. R. Co.*, 61 Vt., 438; *Geroux's Adm'r v. Graves* (Vt.), 19 Atlantic R., 987; *Lilly v. C. C. & A. R. R. Co.* (S. C.), 10 S. E. R., 932; *Mo. Pac. R'y Co. v. Barber*, 44 Am. and Eng. R. R. Cas., 523; *Woodward v. Railway Co.*, 23 Wis., 400.

The same holding was made by the United States Circuit Court upon construction of statute of Montana. 45 Fed. R., 407.

The Missouri cases announce the same principle; that is, that a person suing under the statute must aver and prove all the facts necessary to bring himself within its terms. *Barker v. H. & St. J. R. R. Co.*, 91 Mo., 86; *McIntosh v. Mo. Pac. R'y Co.* (Mo.), 15 S. W. R., 80; *Dulaney v. Mo. Pac. R'y Co.*, 21 Mo. App., 597.

The logic of the Kentucky cases, which decide that the personal representative cannot maintain his action if the deceased left neither widow nor heir (the statutory beneficiaries of the action), would seem to lead to the same result. *Henderson's Adm'r v. Ky. C. R. R. Co.*, 5 S. W. R., 875; *Koenig's Adm'r v. Covington*, 12 S. W. R., 128; *C. N. O. & T. P. R'y Co. v. Adams' Adm'r*, 13 S. W. R., 428.

As applied to statutes like ours, the Supreme Court of Virginia recognizes and approves the same requirement in pleading; but, because the statute of that State gives the personal representative a right of action *generally*—first for the family, and, secondly, for the estate of the deceased—it is held not to be necessary that he should state in his declaration whether he prosecutes the suit for the one or the other. If for either it is sufficient. *B. & O. R. R. Co. v. Wightman's Adm'r*, 29 Grattan, 431; *Matthews v. Warner's Adm'r*, *Ib.*, 570.

In North Carolina the personal representative is, properly, not required to aver that the deceased left a widow, child, or next of kin, "because the statute [of that State] gives the action and authorizes the recovery of damages in any event," if the wrongful act of the defendant be established, the recovery to go to the relatives of the deceased, if any, and, if none, then to the university of the State, under the general statute. *Warner v. W. N. C. R. R. Co.*, 94 N. C., 250.

The same rule would prevail here as in Virginia and North Carolina, if, under our statute as under theirs, the right of the personal representative to maintain his action were dependent alone upon the wrongful act of the defendant, and not also upon the further fact that the deceased left a widow, child, or next of kin. The difference is, that the abrogation of the common law rule as to the extinguishment of such a right of action by death is entire in those States, while it is only

partial in this one. There the plaintiff brings himself within the statute by a simple averment of the death of his intestate by the wrongful act of the defendant. To have that effect here, he must aver, in addition, the survivorship of some person within the statutory designation.

As the defendant is entitled to a reversal and new trial on account of the error in the charge, we do not decide whether the defect in the declaration was cured by the verdict or not.

Though not averred, the deceased was shown to have left a widow. Not only did the defendant fail to object to the evidence, but it introduced the widow herself as a witness, and proved the fact by her.

Reverse and remand.

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Brown v. Cheatham.

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## BROWN v. CHEATHAM.

91	97
110	79

(Nashville. January 9, 1892.)

1. MARRIAGE AND DIVORCE. *Of slaves.*

Slave marriages, though never authorized or regulated by statute in this State, have been recognized as valid by the Courts, and the issue thereof declared legitimate, when the marriage was entered into with the master's consent. And such marriages, once consummated, could not be dissolved by any act of the parties while slaves without like consent of the master.

Cases cited and approved: Downs v. Allen, 10 Lea, 666; Andrews v. Page, 3 Heis., 668; 6 Jones (N. C.), 235; 20 Johns., 1.

2. SAME. *Same.*

And the parties to such valid slave marriage had not the right, after their emancipation, to annul it and enter into other matrimonial unions; and if they did so the issue of the latter marriage is illegitimate.

3. SAME. *Same.*

The Act of 1865-66, Ch. 40, providing that "all free persons of color, who were living together as husband and wife while in a state of slavery, are hereby declared to be man and wife, and their children legitimately entitled to an inheritance" of their parents' estates, applies alone to such slave marriages as had been lawfully entered into.

Code construed: § 3303 (M. & V.); § 2447a (T. & S.).

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FROM MAURY.

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Appeal in error from Chancery Court of Maury County. A. J. ABERNATHY, Ch.

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Brown v. Cheatham.

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SOUTHALL & SMISER for Brown.

FIGUERS & PADGETT, W. S. FLEMING & SON, and  
HUGHES & HATCHER for Cheatham.

LURTON, J. This is a bill of ejectment. Complainant claims as heir at law of Addison Denton, colored. Defendants claim that Addison died without heirs at law, and that under § 3272, Code of (M. & V.), the property descended to his widow, Sylvester Denton, from whom they purchased and under whom they claim. The title depends upon the validity of the marriage of Rachel, the mother of complainant, to the intestate, Addison.

Under the statute a jury was called, and issues of fact submitted for their determination. The jury found that the marriage of Rachel to Denton was valid, and that complainant was the sole heir at law of said Denton; and a decree for the recovery of the property was pronounced.

Rachel is shown to have been a slave, and to have so continued until her emancipation in 1865 by the amendments to the Constitution of this State adopted in that year. It does not appear whether Addison was free or slave.

There was evidence tending to show the celebration of a marriage ceremony, by a colored preacher, in 1864, between Rachel and Addison. This was followed by cohabitation, which continued for about a year, when Addison abandoned her, and in April, 1866, contracted another marriage,

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under license, with a woman known as Sylvester. Addison and Sylvester lived together as husband and wife until the death of the former in 1878. Defendants claim under conveyance from this woman Sylvester. Either just before or just after the desertion of Rachel by Addison complainant was born. There is evidence tending to show that Addison recognized him as his son. Prior to this short-lived connection with Addison, Rachel is shown to have contracted three other slave marriages. The validity of her marriage to Denton depended chiefly upon the sufficiency of the evidence tending to show the dissolution of these antecedent contracts.

The Court, after telling the jury that our statutes on the subject of marriage and divorce did not relate to or affect the slave population of the State, instructed them as to the dissolution of marriages between slaves as follows: "But as no law was in existence either before or during the war to require slaves to obtain licenses prior to marriage, or authorizing the issuance of such licenses, so there was no law authorizing a divorce of husband and wife who were slaves; and a permanent separation of the parties by a sale of the husband or wife by the master, or by any other act of the parties, either with or without the consent of the master, would amount to divorce as between such slaves; and any other marriage after such permanent separation, entered into by either husband or wife, would be a valid marriage as



between the slaves or under § 3304 of the Code." This presents the question as to whether a separation by a married slave couple without consent of the owners would be such a dissolution of a marriage as would make such separated parties competent to contract a subsequent marriage. It is true that our statutory marriage and divorce law has never been regarded as applying to the slaves held in this State. Yet it by no means followed that slaves could not enter into *de facto* marriages to which many of the consequences of a statutory marriage attached. This subject was fully and ably considered by this Court in the great case of *Andrews v. Page*, where the opinion was delivered by Judge Nelson. After reviewing the history of slavery in this State, and the status of the slave as a person in the light of the decisions of the Courts of this State, he summed up the *ante bellum* law upon the subject of slave marriages in these words: "We hold that a marriage between slaves, with the assent of their owners, whether contracted in common law form or celebrated under the statute, always was a valid marriage in this State, and that the issue of such marriages were not illegitimates." 3 Heis., 668. It is true that this holding was not in accord with the views entertained by the Courts of several of the Southern States. In many of these it had been held that slave marriages were null and void. The ground upon which these cases stood was (1) that a slave had no such freedom of will as

would enable him to consent to a marriage; (2) that the duties of husband and wife were incompatible with the duties which the slave owed to his master. 1 Bishop on Marriages and Divorces, Section 156 and cases cited.

Judge Pearson, in *Howard v. Howard*, thus stated the doctrine as generally held: "Marriage is based upon contract; consequently, the relation of man and wife cannot exist among slaves. It is excluded both on account of their incapacity to contract and of the paramount right of ownership in them as property." 6 Jones (N. C.), 235. But, as demonstrated by the masterly review of the status of slaves in this State, these objections to slave marriages, growing out of the want of freedom of will and of the paramount duties of the slave to his owner, are altogether obviated when the owners have consented to the marriage. Whenever such consent is shown, either by direct evidence or by facts circumstantially establishing such consent, the marriage of slaves is a valid and legal marriage, and the issue legitimate. In New York and Massachusetts—both having been slave States for more than a century—these legal obstacles to marriage among slaves were removed by legislation. In New York it was by statute declared that slave marriages should be valid, and in Massachusetts an act of assembly provided that "no master shall unreasonably deny marriage to his negro with one of the same nation, any law, usage, or custom to the contrary notwithstanding." *Mar-*

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*bletown v. Kingston*, 20 Johns., 1; Bishop on Marriage and Divorce, Section 156, who for the Massachusetts legislation cites a note to *Oliver v. Sule*, Quincey, 29.

That the consent of the master was essential to the validity of a slave marriage was again announced by this Court in *Downe v. Allen*, 10 Lea, 666.

Inasmuch as our divorce laws did not apply to slaves, and inasmuch as the very nature of the institution of slavery made all such marriages subject to the will of the owner, so, for the same reasons, the dissolution of these *de facto* marriages depended likewise upon the will of the owner. Separation of the parties by consent of the owners operated in this State to dissolve the union and render the divorced persons competent to contract a new relation. But the voluntary separation of husband and wife has never been held to operate as a divorce. The consent of the master was as essential to the putting off of the yoke as it was to the putting on. The reasons in the one case are as equally operative in the other, and lie, as we have seen, in the absence of power to consent and in the relation the slave stood toward the owner. The permanent separation of a slave couple by act of the master, though not consented to by the parties—as, when the husband or wife was sold to another State—operated necessarily to dissolve the relation. The temporary separation incident to a limited hiring or due to a temporary exigency,

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such as the sending of a slave inside the lines of the Confederate army to prevent his forcible abduction or his running away, and not intended by the owner as a permanent separation, would not operate as a dissolution of a *de facto* marriage. Such a divorce would rest neither upon the consent of the parties nor the owner, and would not be the intended or necessary result of the act of the owner. It was error in the Chancellor to instruct the jury as he did—that a permanent separation by the act of the master, “or by any other act of the parties, either with or without the consent of the master, would amount to a divorce.” Such a view of the law would have resulted in wide-spread concubinage, and would have operated to defeat the humane and Christian endeavors of masters to inculcate the obligation of the marriage relation and the duty of virtue. It is not in accord with the decided cases which we have before cited, both of which expressly make the dissolution of the union depend upon the consent of the owner.

The Act of 1866, being §§ 3303, 3304, Code (M. & V.), upon which his Honor laid much stress in his charge, had no other effect than to ratify such slave marriages as had been contracted with the consent of the owners, and which therefore constituted the parties “husband and wife” within the meaning of these sections. The right of inheritance conferred by that Act is dependent upon the existence of such marital relations as were valid

under the law of marriage as applicable to slaves. If married conformably to the usages of slavery, then they constituted the "husband and wife" referred to in the Act of 1866. To construe that Act as making valid every relation of concubinage into which the parties may have entered, and during which they may have lived as *if* husband and wife, would do violence to the well-intended purpose of the law-makers. To construe the Act as operating to set up and restore matrimonial relations theretofore dissolved according to the law of the State affecting slave divorces, would operate to restore the three previous marriages of the woman Rachel, and constitute her a wife with three living husbands.

If the *de facto* relation had been dissolved by consent of the master, or as a necessary result of his act, then the Act of 1866 did not operate to restore the bonds. So, if that Act should be construed as recognizing no distinction between mere meretricious cohabitations and the marriages regularly celebrated by consent of the owner, it would result in rendering many subsequent marriages bigamous, and illegitimate thousands of children who were, under the law as it stood before, the legitimate issue of lawful wedlock.

The Act should be construed as merely ratifying marriages which, as we have seen, were already lawful and legitimate under the law as it stood. In this view of the statute it had no bearing upon this case. If Rachel was competent to marry

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Denton in 1864, then, independently of that statute, her marriage, if with the consent of her owner, was valid. If she was not competent by reason of a previous marriage, or if her marriage was in defiance of her owner, as it would be if, as there was evidence tending to show, she left her owner as the captive of Denton and fled to the shelter of a Federal garrison, then the Act of 1866 did not validate such invalid marriage.

The case will be reversed and a new trial awarded, when his Honor will charge the jury upon the lines herein indicated.

Complainant will pay the costs of appeal.

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O'Bryan Bros. v. Glenn Bros.

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O'BRYAN BROS. v. GLENN BROS.

(Nashville. January 9, 1892.)

1. ESTOPPEL. *By repudiation of benefits of deed.*

Repudiation of the benefits of a deed by an unequivocal and decisive act done by the beneficiary with full knowledge of all the facts affecting his rights, estops him conclusively and forever to assert any rights under the deed.

Cases cited and approved: Farquharson v. McDonald, 2 Heis., 419; Bell v. Steel, 2 Hum., 148.

2. SAME. *Same.*

And filing bill impeaching the deed as fraudulent is such unequivocal and decisive act on the part of the beneficiary as, when done with full knowledge of the facts, works an estoppel upon him.

3. SAME. *Same.*

And if the bill was filed with full knowledge of the facts, the estoppel attaches and continues, although the act was induced by the mistaken advice of an attorney as to the validity of the deed, and notwithstanding the fact that the beneficiary, upon being better advised, promptly dismissed his bill before any loss or injury had resulted to any one in consequence of its being filed.

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FROM MAURY.

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Appeal from Chancery Court of Maury County.  
A. J. ABERNATHY, Ch.

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O'Bryan Bros. v. Glenn Bros.

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HUGHES & HATCHER, and FIGUERS & PADGETT for  
O'Bryan Bros.

GEORGE P. FRIERSON for Glenn Bros. .

LEA, J. On June 29, 1891, the Glenn Bros., merchants and residents of Maury County, made a special assignment of their stock to J. W. and C. A. Lee for the purpose of securing, in the order named, the following indebtedness:

First, a debt of \$350 to C. A. Lee; second, a debt of \$565 to O'Bryan Bros.; and, lastly, a debt of \$371 to the Connell-Hall-McLester Co. On the same day the deed was filed for registration. The trustees were given power to take immediate possession of said stock of goods, to sell the same at once, and appropriate the proceeds to the payment of costs, then to the debts named in the order indicated.

On the day after the deed was filed for registration J. W. and C. A. Lee, who reside in Williamson County, came to Columbia to examine into the matter. They went to the Register's office, procured the deed or a copy thereof, and carried it home with them. While in Columbia C. A. Lee asked the opinion of a lawyer in regard to the trust deed, who told him there was nothing for him to do but to accept the trust, qualify, and execute the same. Two days afterward the Lees went to Franklin, as C. A. Lee says, to seek advice in regard to his duties, liabilities, and rights



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under the deed. Upon reaching Franklin they showed the deed to a bank cashier and a grocery merchant, who advised them that the deed was worthless, and advised them to consult an attorney. They did so, and he advised them the deed was invalid, and void as contravening the general assignment statute. Thereupon, at the instance of the attorney, an attachment bill was drafted, in which it was alleged that the deed was made to defraud the creditors of the Glenns, and especially the complainant, C. A. Lee, and asking that the deed be declared fraudulent and void, and the property therein conveyed be attached, sold, and applied to the payment of the indebtedness of the Glenns to complainants.

The bill was sworn to, and C. A. Lee boarded the train and went to Pulaski and obtained from the Chancellor a fiat for an attachment. He returned to Columbia, and on July 3 he filed the bill in the office of the Clerk and Master, and thereupon an attachment was issued and placed in the hands of the Sheriff, and the stock of goods conveyed in the assignment to the trustees, J. W. and C. A. Lee, was levied on by the Sheriff. After this they again consulted an attorney at Columbia, who advised them that the deed of assignment was valid, and then on July 9 they dismissed the attachment bill. Afterward they gave bond as trustees, and were proceeding to close the trust when the bill was filed in this case against them and the Glenn Bros. by O'Bryan Bros. and

the assignee of the Connell-Hall-McLester Company, the two other creditors named in the assignment, to have a receiver appointed, and to exclude C. A. Lee from any benefit under the trust, as he had repudiated the same, alleging that the filing of the attachment bill was an election to renounce the trust.

The Lees answered and admitted the facts above set forth, but insisted that they filed the attachment bill under the advice of an attorney, and alleged and proved that there was no loss or injury of any kind to the property attached from the date of attachment to the dismissal of the bill.

Upon the hearing the learned Chancellor held that, there being no loss or injury to the property, and as complainants suffered no loss or injury to their rights or interest in the premises, that defendants, J. W. and C. A. Lee, did not, by the filing of their attachment bill, lose their right to act as trustees and to execute the trust, and that the defendant, C. A. Lee, did not thereby forfeit or lose his rights under said deed, and complainants' bill was dismissed.

The action of the Court was erroneous. The defendants could elect to take under the assignment, or they might renounce the same and attack the assignment, but a creditor cannot be permitted to assail and claim under an assignment. It has been held by this Court, and it is sustained by all the authorities, that any distinct and unequivocal act of renunciation of the benefits of a deed

by any of the creditors intended to be benefited, will operate against any further claims under the deed. *Farquharson v. McDonald*, 2 Heis., 419.

They elected to renounce and repudiate the benefits of the assignment when they filed the attachment bill alleging that the assignment was fraudulent and void. 121 N. Y., 167. But it is insisted that the attachment bill was filed by the defendants under a mistaken view of the law by an attorney. This can make no difference. The Lees were acquainted with all the facts in the case, and that they were wrongfully advised cannot, of itself, destroy or render nugatory their renunciation of the benefits under the assignment. *Bell v. Steel*, 2 Hum., 148.

It is further insisted that complainants in this case suffered no loss or injury to their rights or interest by the filing of the attachment bill and the attaching of the assigned property, and, therefore, that they are not estopped to assert their rights under the deed of assignment. Bigelow on Estoppel, 573 (5th Ed.), says: "The election, if made with knowledge of the facts, is in itself binding; it cannot be withdrawn without due consent, although it may not have been acted upon by another by any change of position." Herman, in his work on Estoppel and Res Judicata, 1177, edition of 1886, says: "One entitled to a benefit under an instrument, whether it be a will or any contract, if he claims the benefits of such instrument, he must abandon every right the assertion wherof

would defeat even partially the provisions of the instrument. A party cannot occupy inconsistent positions, but will be confined to his election." In 2 Swan, 282, it is said: "In case of election, the rule is, if a person determines his election, it shall be forever determined."

The question is, Has an election been made by a direct and unequivocal act? If so, he must stand by it, and his future action cannot be changed by the fact that others were not injured; and, therefore, it was wholly immaterial whether any loss or injury was sustained by complainants between the filing of the attachment bill and its dismissal.

The result is that the decree of the Court dismissing complainants' bill is reversed, and this cause will be remanded for the purpose of having said trust executed under the directions of the Court, in accordance with this opinion. The defendants, J. W. and C. A. Lee, will pay the cost of this Court and of the Court below.

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Barker v. Freeland.

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BARKER v. FREELAND.

(Nashville. January 14, 1892.)

1. WRITTEN INSTRUMENTS. *Construction of, when by Court and when left to jury.*

It is a general rule that the Court must construe written instruments offered in evidence and declare their meaning to the jury. "But when the writing is not plain and unambiguous, and is such as requires the aid of parol evidence, either to identify the subject-matter or in order to ascertain the situation and surrounding circumstances, or the nature and quality of the subject-matter, and the parol evidence is conflicting, or such as admits of more than one conclusion, it is not error to submit the interpretation of the doubtful parts of the instrument, under proper instructions, to the jury." This case falls within the exception to the general rule.

Cases cited and approved: *Mills v. Farris*, 12 Heis., 462; *Mumford v. Railroad*, 2 Lea, 393.

2. SALES OF PERSONALTY. *When title passes to buyer.*

It is a general rule that "when by the agreement the vendor is to do any thing to the goods for the purpose of putting them in that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property." This case affords sufficient "circumstances indicating a contrary intention" to support the jury's finding under a proper charge that title passed to the buyer before final delivery of the goods.

3. SAME. *Risk of injury to property.*

The general rule is that personal property, the subject-matter of sale, remains at the risk of the seller until the sale has been completed by delivery. But this is a mere presumption that may be rebutted by stipulation, or by "circumstances indicating a contrary intention."

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. There are, in this case, circumstances that justify the jury's finding, under a proper charge, that the goods should be at the buyer's risk before final delivery.

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FROM GILES.

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Appeal from the Chancery Court of Giles County.  
A. J. ABERNATHY, Ch.

JONES & EWING for Barker.

JOHN T. ALLEN, W. H. McCALLUM, and J. P.  
ABERNATHY for Freeland.

LURTON, J. Complainant bought from defendants a crop of potatoes in a certain forty-acre field. He shipped them by rail from Pulaski to points in other States. Upon arrival at destination several car-loads were found to be worthless from decay. He alleges that they were not "good, merchantable stock" when delivered to him, and his damages to be the price he paid for them, plus freights expended.

Issues were submitted to a jury, who found for defendants, and the Chancellor, upon the findings, dismissed the original bill.

The contract of sale was in writing, and was

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in these words: "We this day sell Jacob Barker forty acres of Early Rose potatoes, at sixty cents per barrel. He furnishes sacks, and we are to put them at the depot at Pulaski as soon as sacks come to us. And we agree to give him full measure and good, merchantable stock; and we will keep his men out with us that will attend to filling and sewing the sacks. We will load a car a day, weather permitting. Said Barker is to pay for each car as loaded."

The Court, in substance, instructed the jury that the defendants were, as matter of law arising upon construction of the written contract, bound to deliver "good, merchantable stock" at their field and into the sacks of complainant; but that the question as to whether they were obligated to deliver "good, merchantable stock" on the cars at Pulaski was for the jury to say, under all the facts and circumstances submitted to them in the evidence; that if they found "good, merchantable stock" had been delivered into the sacks of complainant, and that defendants had used due care in hauling them, when sacked, to the cars, that then defendants would not be liable for injuries consequent upon hauling them from the field to the cars, unless they should find that, under the contract, the potatoes were to be "good, merchantable stock" when put on the cars. We must regard the verdict as determining that these potatoes were up to the contract when put into complainant's sacks in the field, for the jury were plainly

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instructed that defendants would be liable in case this were not so. The verdict must also be taken as settling the fact that defendants were guilty of no negligence in hauling them to Pulaski or in loading them on the cars. There was evidence tending to show that these potatoes were much injured by hauling them from the field where they were sacked to the cars at Pulaski, a distance of seven or eight miles, and that the subsequent decay was due to the injuries thus sustained. Complainant's contention was and is that the construction of the contract was exclusively for the Court; that under the written contract the title to the property did not pass to the buyer until delivery on the cars, and that the risk of delivery was on defendants. The Court was, in substance, requested to so instruct the jury, but these requests were refused.

From the evidence it appeared that these potatoes were undug at time of sale, and were in a field seven miles from the point where defendants were to put them on the cars; that they were the first crop of potatoes, and unusually long and large. There was also evidence tending to show that such potatoes were much more liable to be broken if transported in sacks than in barrels, and that decay was more likely to result from such breakage if in sacks such as those furnished by complainant than if hauled in barrels, which was the more common and safer method. There was evidence tending to show that complainant's atten-



tion was called to these facts, and that he elected to use sacks as the cheaper method of getting the crop to market.

It is an indisputable proposition that when a contract is in writing, and its meaning is plain and unambiguous, that its interpretation is matter of law for the Court. But when the writing is not plain and unambiguous, and is such as requires the aid of parol evidence, either to identify the subject-matter or in order to ascertain the situation and surrounding circumstances, or the nature and quality of the subject-matter, and the parol evidence is conflicting, or such as admits of more than one conclusion, it is not error to submit the interpretation of the doubtful parts of the instrument, under proper instructions, to the jury. Thompson on Trials, Section 1081, and cases there cited.

This proposition is clearly deducible from our own cases. *Mills v. Farris*, 12 Heis., 462; *Mumford v. Railroad*, 2 Lea, 393.

The learned counsel for complainant has urged very strenuously the fact that the written contract required defendants, after the potatoes were sacked, to put them on the cars at Pulaski. From this fact he insists upon two conclusions of law as necessarily following: (1) That the property did not pass to the buyer until the seller had put them on the cars; (2) that the risk of delivery on the cars remained with the seller.

Neither of these conclusions are the necessary consequence of an agreement by the seller to de-

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liver, though they generally follow. Let us look at the first. The doctrine as to the vesting of the property in sales of personalty, as deduced from the decided cases, has been very carefully and precisely formulated in what are so well known as the rules of Lord Blackburn. His first rule is this: "When by the agreement the vendor is to do any thing to the goods for the purpose of putting them in that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, *in the absence of circumstances indicating a contrary intention*, be taken to be a condition precedent to the vesting of the property." Admitting that the putting of the goods on the cars would ordinarily be treated as a thing which was a condition precedent to the vesting of the property, yet this case presented circumstances "*indicating a contrary intention*" which might fairly be left to the jury. These circumstances have already been sufficiently alluded to.

The second deduction is so inconclusive as to amount only to a presumption in the absence of circumstances indicating a contrary intention. The property may be in seller and the risk of delivery in the buyer. The presumption is that the risk and the property go together, but this presumption may be overthrown by agreement or by circumstances indicating a contrary intention. Ordinarily, if by the terms of a sale, the seller engages to deliver the thing sold at a particular place, the

price is not demandable until such delivery be made. But if the contract of sale is otherwise complete, and the circumstances indicate that the thing sold was to be in the meantime at the risk of the buyer, the latter would be bound to pay for it whether the property passed or not, if delivery was prevented without negligence of the seller. To this effect were the cases of *Castle v. Playford*, L. R., 5 Exc., 165, and 7 Exc., 98; and *Martineau v. Kitching*, L. R., 7 Q. B., 436; see also 1 Benj. on Sales, Secs. 374, 375, 377.

The circumstances of this case to be observed in this connection are these: The fact that complainant bought a crop in the field; that he was to have his own agent attend to the filling and sewing of the sacks; that he selected his own vehicles for containing the goods; and that at the field they were put into his own bags. These facts make a case where it might well be submitted to the jury as to the intention of the parties with respect to the risk of delivery on the cars, regardless of whether the title passed or not before such delivery.

The charge, while technically subject to some criticism, submitted substantially, and in a very clear and inartificial way, the question of intention as to the risk of delivery.

The decree must be affirmed.

## FRANKLIN v. FRANKLIN.

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(Nashville, January 14, 1892.)

1. COUNTY COURT. *Is Court of general jurisdiction as regards administration.*

Doctrine re-affirmed that the County Court is a Court of general jurisdiction as regards administration upon the estates of decedents; and that its proceedings had in administration cases are entitled to the protection of those rules and presumptions that obtain in favor of the judgments of Courts of general jurisdiction. (*Post*, p. 128.)

Case cited and approved: *Railway Co. v. Mahoney*, 89 Tenn., 311.

2. ADMINISTRATOR. *Appointment of voidable, not void, when.*

Appointment of administrator by County Court, upon the estate of a decedent as an intestate, is not void on collateral attack, but only voidable upon direct attack, where the decedent was not in fact an intestate, and his will was subsequently discovered and probated. (*Post*, pp. 126-132.)

Cases cited and approved: *Pinkerton v. Walker*, 3 Hay., 220; *Baldwin v. Buford*, 4 Yer., 20; *Fay v. Reager*, 2 Sneed, 200; *Killebrew v. Murphy*, 3 Heis., 551; *Johnson v. Gaines*, 1 Cold., 288; *Railway Co. v. Mahoney*, 89 Tenn., 311; 8 Cranch, 9; 14 Peters, 33.

Cited and distinguished: *Wilson v. Frazier*, 2 Hum., 30; *D'Arusment v. Jones*, 4 Lea, 251.

3. STATUTE OF LIMITATIONS. *Runs against decedents' estates, when.*

And statutes of limitations run against such administrator upon all causes of action that had accrued to the decedent; and where such administrator is barred, the executor, subsequently appointed upon discovery and probate of the will, is also precluded by that bar. (*Post*, pp. 125-132.)

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4. SAME. *Ten years bars suit for legacy.*

Suit brought against an executor for recovery of a legacy more than ten years after final settlement of his accounts in the County Court is barred by the statute of limitations of ten years. (*Post*, p. 132.)

Code: § 3473 (M. & V.); § 2776 (T. & S.).

5. SAME. *Same. When settlement is final.*

In 1877 the executor made full and final settlement of his accounts in the County Court, showing amounts due the legatees or distributees. In 1885 he collected a claim from the Federal Government due the estate, which had not been taken into account in the former settlement. In regard to this latter sum he had made no settlement when he was sued as executor by the legatees in 1891.

*Held*: The settlement of 1877 was final in such sense that the statute of ten years began to run against legatees from its date, as to matters therein embraced, but not as to amount received by the executor in 1885. (*Post*, pp. 122-125, 132.)

*Quere*: Did suit, *quia timet*, brought by claimants under will to impound and preserve the estate pending contest over probate of will, operate to arrest the running of statutes of limitations against them?

Case cited: *Brown v. Brown*, 14 Lea, 259.

6. SAME. *Six years bars suit for legacy, when.*

If an executor, after final settlement, appropriates the fund left in his hands to his own use, by some unequivocal act, upon the claim, made in good faith and under color, that he is the lawful legatee or distributee, then suit against him by the rightful legatee or distributee will be barred unless it is brought within six years after such appropriation of the fund by the executor. The statutes of three and ten years do not apply in such case. But this rule does not obtain in favor of an executor who has not made settlement or unequivocally appropriated the fund as distributee. (*Post*, pp. 122-125.)

7. WILL. *Example of class doctrine.*

Testator bequeathed to his brother, whom he nominated as his executor, his entire estate, including a legacy due testator from his uncle's estate. Testator then added: "He [the brother] is to have the interest arising from a proper investment of the money from my uncle's estate to do with as he pleases, but the principal is to go to his children in case he has any. In case he dies without heirs I want my sister \* \* \* to have it on same conditions."

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*Held*: The brother takes a life-time interest in the fund, and that upon his death his surviving children take the *corpus* as a class. (*Post*, pp. 123-133, 134.)

Cases cited and approved: *Frierson v. Van Buren*, 7 Yer., 606; *Satterfield v. Mayes*, 11 Hum., 58; *Womack v. Smith*, 11 Hum., 478; *Bridgewater v. Gordon*, 2 Sneed, 9.

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FROM SUMNER.

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Appeal from the Chancery Court of Sumner County. GEO. E. SEAY, Ch.

CHAS. R. HEAD, JAMES W. BLACKMORE, R. K. GILLESPIE, and T. C. MULLIGAN for Ed N. Franklin.

JAMES J. TURNER, S. F. WILSON, and B. D. BELL for J. W. Franklin.

SNODGRASS, J. This is a suit to recover the interest of John Armfield Franklin in the estate of John Armfield, who died testate, in Grundy County, Tennessee, in 1871, leaving a large personal estate to five legatees—testator's wife and four others. The widow dissented from the will, and took her interest under the law upon dissent, so that only the remainder of the estate was left to pass under the will. The four legatees entitled to it were the present complainants, Ed N. Franklin, John Armfield Franklin, Mrs. A. Vanbibber,

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and Mrs. B. Archer. One of these, John Armfield Franklin, died in November, 1871. Ed N. Franklin was appointed and qualified as administrator of his estate December, 1876. John Armfield Franklin had, in fact, died testate, but his will was not discovered for many years thereafter, and not established, it being contested, until several years later—facts to be more particularly stated hereinafter.

The defendant, J. W. Franklin, was named as executor in the will of John Armfield. He qualified as such in the County Court of Grundy County October 2, 1871, and made a settlement of the estate with the Clerk of said Court July 30, 1875. In this settlement he was charged with \$27,342.99 and credited with \$12,209.54, leaving balance then in his hands of \$15,133.45. On September 21, 1877, he made a final settlement, showing balance in his hands from former settlement, \$15,133.45; collected since, \$30,327.72; total, \$45,461.77; credits since, \$14,228.35; due distributees, \$1,232.82. Amount due the widow of this sum was \$10,410.94, leaving \$20,821.88 to pass under the will, or \$5,205.22 to each of the three living legatees, and the same amount to J. W. Franklin, who was the father and distributee of the dead one, John Armfield Franklin. This sum he kept as such distributee and appropriated. The remainder he paid to the parties already named entitled to it. All the parties acquiesced in the settlement, and the present complainant gave his

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receipt for balance in full due him under it December 24, 1877.

In January, 1885, Defendant J. W. Franklin, as executor of John Armfield, collected a claim of his testator's estate against the United States Government of \$18,000, which, after deducting executor's compensation and attorney's fees paid for its collection, and paying the widow, left in his hands for distribution the sum of \$1,890 for each living legatee and the distributee of John Armfield Franklin. He appropriated this \$1,890 as such distributee, and he also applied the same amount due Ed N. Franklin on debts which he held against Ed N. Franklin. The other legatees he paid in full.

In the meanwhile, about the time of the collection and disposition of this fund, a will of John Armfield Franklin was found. This will, which we quote for the purpose of construction hereinafter, is as follows:

“WASHINGTON, GA., October, 1871.

“This is my last will and testament. I will and bequeath to my brother, Edward N. Franklin, my entire estate, including my interest in my Uncle John Armfield's estate, my shotgun, Winchester rifle, watch, gold-headed cane, and every thing that is mine. He is to have the interest arising from a proper investment of the money from my uncle's estate, to do with as he pleases, but the principal is to go to his children in case he has any. In case he dies without heirs, I



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want my sister, Mrs. Adele Vanbibber, to have it on same conditions. I appoint my brother, Ed N. Franklin, to qualify as my administrator and act without bond. I want him to buy a ticket to Louisville, Ky., for Alice and give her \$500.

“J. A. FRANKLIN.”

It was offered for probate at the April term, 1885, of the County Court of Sumner County, was contested, and finally established as the will and ordered probated, and admitted to probate April 13, 1891, in the County Court, under decree of this Court pronounced March 6, 1891. When the will was admitted to probate Ed N. Franklin qualified as executor. On April 28, 1891, he procured an order of the County Court annulling and revoking his appointment as administrator of the estate of John Armfield Franklin, which had been made, as before recited, on December 23, 1876.

Before this will was admitted to probate, Ed N. Franklin, in his own name, and as next friend of his minor children, legatees under the discovered will, filed a bill *quia timet*, alleging facts of discovery and pending contest of the will of John Armfield Franklin, and seeking to bring the executor of John Armfield to a settlement. This bill was filed March 24, 1890.

After the will was admitted to probate, and on April 29, 1891, he filed an amended and supplemental bill as executor of said will, and as next friend of said minors, for same purpose—that is, to compel settlement by the executor, and to recover

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the distributive share of John Armfield Franklin in John Armfield's estate, which, as we have before seen, had been received and appropriated by J. W. Franklin as distributee of the estate of his deceased and supposed intestate son.

The defense was the statute of limitations of three, six, and ten years. By cross-bill defendant also sought to have his own claims against Ed N. Franklin set off against any recovery Ed N. might show himself entitled to as legatee of John Armfield Franklin.

Whether the first bill *quia timet* can be considered as arresting from date of its filing the statute of limitations, as intimated such a bill might do in the case of *Brown v. Brown*, 14 Lea, 259, and thereby make it in time to save the bar of the statute of six years, if J. W. Franklin must be treated as having held the \$1,890 as distributee and not as executor since it was received in January, 1885, the Court deems it unnecessary to decide, though it does decide that six and not three years is the least time that could bar such action. By the majority so determining, the Court also holds that, sued as executor who had made final settlement in 1877, but none as to the last money of the estate received in January, 1885, the only statute which could be applicable in his favor was that of ten years. The question is whether that can be relied on as to final settlement of 1877. The Chancellor held it could not, and defendant appealed.

The theory upon which it is now insisted by complainant that this statute did not run, is that the appointment of Ed N. Franklin as administrator of estate of John Armfield Franklin in 1876 was *void*, and that, therefore, there was no one capable of suing until the appointment and qualification of the executor in 1891.

The first appointment is assumed to be void because John Armfield Franklin did not die *intestate*, and it is insisted that the County Court therefore had no jurisdiction to appoint an administrator. If the contention be true that the appointment was void, then the statute did not run. If the appointment was valid—if only *voidable*—the statute did run; and this is the main question in the case. The appointment was not void. This question is not an open one in this State. *Pinkerton v. Walker*, 3 Haywood, 220; *Baldwin v. Buford*, 4 Yer., 20.

In England, at common law, the rule prevailed that an appointment of an administrator by the ordinary, made in derogation of the right of an executor qualified or acting with or without probate of the will (for there he could do almost all the acts incident to his office except some relating to suits before probate: 1 Williams on Executors, top paging 338-347, 6th Am. Ed.), or who had not renounced the trust, or from whom the will had been concealed (by party obtaining letter, as explained by Judge Freeman in dissenting opinion in *Brown v. Brown*, 14 Lea, 383) was void. See

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Williams, on Executors, Vol. I., Book 6, Ch. 3, top page 655, 6th Am. Ed.

The rule was recognized at least to the full extent in case of an appointment where there were living executors appointed and qualified and capable of acting, in two cases in the Supreme Court of the United States. *Griffith v. Frazier*, 8 Cranch, 9 (Lawyers' Co-op. Ed., Book 3, p. 471); *Kane v. Paul*, 14 Peters, 33 (Lawyers' Co-op. Ed., Book 10, p. 341).

But in the former it was distinctly recognized as the rule that if a Court grant administration where there is an executor who has not qualified, its act, though erroneous, is valid until repealed (pages 25, 26), and the latter refers to this case as authority. Both are digested as deciding this principle by legitimate deduction in the Indexed Digest of Supreme Court Reports, Vol. I., p. 793.

Here there is no cause for the application of the English doctrine of "concealment" if the entire rule on that subject prevailed in this State, because there was no pretense that the will was concealed by defendant or any one else.

But in the 4 Yerger case already cited Judge Catron points out the distinction between the executor's right derived almost exclusively from the will under the English law, and his right under our law as affected by statute, and shows the English rule so founded not applicable here (pages 19, 20, 21). And the distinction is further elaborated in *Fay v. Reager*, 2 Sneed, 200, and *Kille-*

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*brew v. Murphy*, 3 Heis., 551; the latter case probably going too far in assuming the existence of certain power in the executor in advance of qualification, though the power did exist in the same person as widow, and hence the case was on this point correct upon its facts.

Under our law the County Court is a Court of general and exclusive jurisdiction on the subject of administration; and when it makes an appointment of an administrator on the estate of a deceased resident of this State, the appointment is valid until revoked.

Residence in a given county, like intestacy, is made a requisite of the power to appoint, and it has been said an appointment made by the County Court of a county in which a deceased had no residence at time of death is *void*. *Wilson v. Frazier*, 2 Hum., 30.

But the term was inaccurately used for *voidable*, for the Court, in the very case in which it was used, held that it was only voidable, and that to adjudge it void there must be a contest in the Court where made; and this exact point was afterward decided in the case of *Johnson v. Gaines, Ex'r*, 1 Cold., 288, and again explicitly determined in the case of *Railroad Company v. Mahoney*, 5 Pickle, 311.

There it was said that the County Court was authorized to determine for itself the existence of the facts which authorized the appointment, and, having done so, the appointment was not void. Page 318.

It is true that in that case there was no question of intestacy, and the question was one of residence or inhabitancy, and the principle was not extended there beyond the case of an admitted intestate; but intestacy, like inhabitancy, is one of the facts the County Court must determine, and the two questions fall together within the power of the Court to settle when the appointment of an administrator is asked. When the appointment is made, both are adjudged, and that is conclusive until reversed or vacated. *Schluter v. Bank*, Lawyers' Reports, Annotated, Book 5, pages 513, 514, and authorities cited.

In the *Schluter* case, which was a well-considered one where many authorities were referred to in argument and by the Court, the Court said: "Our attention has been called to no case, and we are confident that none can be found, holding that the subsequent discovery of a will, and its admission to probate, renders the prior appointment of an administrator absolutely void, so as to give no protection to persons who in dealing with the administrator have acted on the faith thereof." Page 513, citing further *Woerner on Administration*, pages 568, 571, 588.

It would have been more nearly correct, if not absolutely so, to have said: "No modern case can be found so holding." See also 4 Ohio, 138; 58 Maine, 225; 31 Maine, 504.

Like intestacy, as we have seen, the question of residence has been treated as a jurisdictional

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one, and there are cases cited in the books in which it has been held that finding it incorrectly by the Court authorized to make the appointment, rendered the appointment void. There were a number of these cases in Massachusetts. See cases collected in 1 Williams on Executors, top page 631, 6 Am. Ed., note C.

But the rule is now changed in that State by statute to meet the hardship involved in such a judicial view (*Ibid.*), and specially opinion in *Record v. Howard*, 58 Maine, 225.

The only apparent qualification of that doctrine (for it is not really so) is the appointment of an administrator on the estate of a living man, for this is universally held void, and that upon the ground that no Court is vested with such jurisdiction. *Railroad Company v. Maloney*, 5 Pickle, 319; *Moore v. Smith*, 73 Am. Dec., 122, and notes; 47 Am. Rep., 458, and notes; 107 Ill., 517.

Death is the one fact which must exist to give any Court jurisdiction. When it exists the others of residence and intestacy are open to proof. If decided erroneously the appointment may be voidable, but is not void. One Court went to the extent of holding that erroneous ascertainment of this fact did not make such an appointment void. But subsequently the same Court held that appointment void, it appearing that the Court in fact had not received evidence of it. *Roderigas v. East River Savings Institution*, 32 Am. Rep., 309 (N. Y.).

When the question first arose in this State, it was by a divided Court that it was settled adversely to the validity of such appointment where the fact of death was found incorrectly in the appointment. 4 Lea, 251. But it is obvious from that case that such fact was the only one the non-existence of which would render such appointment absolutely *void*.

To the same effect, as the question is now settled that the action of the County Court making the appointment is only voidable and not void, are the cases of *Varnell v. Loague*, 9 Lea, 158; *Posey v. Eaton*, 9 Lea, 504; *Brown v. Brown*, 14 Lea, 258; *State v. Anderson*, 16 Lea, 321.

There were three cases determined together in the last opinion. The facts of all are not given, but among the cases in which Anderson's appointment was held not void was one in which there was a will naming an executor. No distinction was taken as to the validity or invalidity of Anderson's appointment as administrator on this account, because, though the question was made, the Court held that none existed. Counsel cite other unreported cases to same effect.

We think no question is better settled in this State, and in the current of modern authority, or upon sounder reason. Wills may frequently be made and lie, as this, for years without discovery. The exercise of the jurisdiction of appointment of an administrator would be always unsafe and uncertain if the appointment was to be rendered



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void *ab initio* by the discovery of a will. The evils attendant upon such a rule are far greater than can possibly result from the contrary holding. It were better that rights thus acquired should be settled by the statute of limitations than that parties should never acquire any in cases of administration, or never be sure that those supposed to have been acquired were in fact so.

The old English rule to the contrary was in 1857 changed there by statute 20 and 21 Victoria, Chapter 77, Section 75, cited in 1 Williams on Executors, 6th American Edition, pages 619, 632, 639. And so it is generally changed where it ever prevailed in the American States by effect of statutes making executor's power depend on Court appointment and qualification. 7 Am. & Eng. Ency. of Law, p. 193, and notes; 1 Williams on Executors, top page 347, and notes, 6th Am. Ed.

The settlement made in 1877 was final in the sense of the statute, notwithstanding years after another claim due the estate, not therein included, was collected by the executor; and suit to recover balance due in that settlement could not be sustained after ten years. As neither bill in this cause was filed within ten years of that date, no recovery can be had on that account. The money received in January, 1885, was within ten years of the filing of either bill, and recovery, therefore, can be had as to the \$1,890 due as John Armfield Franklin's proportion of that fund.

The complainant will therefore, as executor of

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John Armfield Franklin, recover this amount with interest from the date it came to the hands of defendant as executor of John Armfield. He will recover interest because there was nothing to prevent a payment of that fund at that time, as there was a party in existence capable of receiving it—the representative of John Armfield Franklin's estate.

After it is received, complainant, as legatee, has an interest, but what that interest is can only be ascertained after settlement of expenses of the estate incurred in litigation—it seems there are no debts or other charges against the estate. But it is obvious that large expenses have been incurred in establishing the will and prosecuting this cause, and it is only out of the net surplus that the legacy is to be settled. Of whatever this may be, complainant will be entitled to a life estate, and defendant to a set-off as to this, on account of his debts established as decreed by the Chancellor.

The corpus of the fund remaining after settlement of expenses and charges indicated, will, on the expiration of the life estate of Ed N. Franklin, belong to his surviving children, who take as a class under the will, the bequest being to a class of persons subject to fluctuation by increase or diminution of its number in consequence of future births or deaths, and the time of payment or distribution of such fund being fixed at a subsequent period on the happening of a designated event, and the bequest being of an aggregate fund

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given to the children as a unit and passing a joint interest. 7 Yer., 606; 11 Hum., 58, 478; 2 Sneed, 9.

The word "heirs" used in the will is manifestly used in the sensé of children.

The cause will be remanded for an account to ascertain the amount, if any, which may be the subject of set-off in favor of defendant.

The costs of the cause accrued below will be paid two-thirds by defendant and one-third by complainant; that of this Court will be equally divided between them, both having appealed and assigned errors. The amount charged to complainant may be paid out of the fund recovered to be administered.

## INSURANCE CO. v. TRUSTEES C. P. CHURCH.

(Nashville. January 16, 1892.)

1. CHARGE OF COURT. *Requirement of written charge upon request in civil case mandatory.*

The statutory requirement is mandatory that the trial Judge shall, upon the request of either party to a civil case, "reduce every word in his charge to writing before it is delivered to the jury," etc.; and the Court's failure to comply strictly with such request constitutes reversible error, although it does not appear that exception was taken on that account in the lower Court, or that any injury thereby resulted.

Code construed: § 3672 (M. & V.).

2. SAME. *Same. Example of violation of statute.*

And it constitutes a violation of this statutory requirement, for which the case will be reversed, where the Court, before reading his charge to the jury, said to them orally: "Gentlemen of the jury: You are to try this case upon the sworn testimony of the witnesses who have been introduced; if you know any thing about the matter in controversy between the parties, or any thing in relation to any matters about which any witness has testified, you will not communicate any such matter to any of your fellow-jurors; nor will you allow any thing which you may know about the matter of your own knowledge to influence your verdict in the case. You must try the case alone upon the sworn testimony of the witnesses and other proof introduced before you, and the charge of the Court which I will give you in writing; and you are not to suffer any one to talk to you about the cause." Such language is appropriate for the charge, and must be written.

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FROM RUTHERFORD.

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Appeal in error from Circuit Court of Rutherford County. ROBERT CANTRELL, J.

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Insurance Co. v. Trustees C. P. Church.

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C. A. SHEAFE and STOKES & STOKES for Insurance Co.

McLEMORE & RICHARDSON and H. E. PALMER for Trustees C. P. Church.

LEA, J. Upon the trial of this cause, before any evidence was submitted to the jury, the plaintiff in error requested the Court to deliver his charge to the jury in writing. After the argument of the case had closed, the Judge said orally as follows:

"Gentlemen of the jury: You are to try this case upon the sworn testimony of the witnesses who have been introduced; if you know any thing about the matter in controversy between the parties, or any thing in relation to any matters about which any witness has testified, you will not communicate any such matter to any of your fellow-jurors; nor will you allow any thing which you may know about the matter of your own knowledge to influence your verdict in the case. You must try the case alone upon the sworn testimony of the witnesses and other proof introduced before you, and the charge of the Court which I will give you in writing; and you are not to suffer any one to talk to you about the cause."

He then proceeded to give his written charge to the jury. The request for a written charge was made under the Act of 1875 (M. & V. Code, § 3672), which is as follows: "On the trial of civil cases in the Courts of this State, it shall be the

duty of the Judge before whom the same is tried, at the request of either party, plaintiff or defendant, to reduce every word in his charge to writing before it is delivered to the jury, and all subsequent instructions which may be asked for by the jury, or which may be given by the Judge, shall in like manner be reduced to writing before being delivered to the jury."

This section is nearly the same as § 6052 of the Code (M. & V.) in regard to felony cases, only in all felony cases it is made the duty of the Court to reduce every word of the charge to writing, while this section imposes the same duty upon the Judge when the charge is requested in writing. This Court in several cases have passed upon the felony statute, and have declared that it was imperative; that the charge must be given in writing, and upon failure this Court would reverse; and that we could not even inquire if the party was in any manner injured thereby. This statute, when a plaintiff or defendant requests that the charge be in writing, is as imperative as the felony statute. It provides that when a written charge is requested, that the Judge is "to reduce every word of his charge to writing before it is delivered to the jury." But it is insisted that what was said orally were directions and cautionary instructions to the jury, and not a charge; that a charge, as defined by Bouvier, is "the exposition by the Court to the jury of those principles of the law which the latter are bound to

apply in order to render such a verdict as will, in the state of facts proved at the trial to exist, establish the rights of the parties to the suit."

To tell the jury that they must try the case upon the sworn evidence of witnesses, independent of their own knowledge of facts known to them but not proven, and such knowledge was not to influence them, was an exposition of the law not only applicable to this case, but every other case, and when the Court undertakes to charge this general principle it must do so as the statute directs. Suppose the jury, after the charge, had asked this instruction, or counsel had requested the Court to charge the oral statements made to the jury, can it be pretended that it would not have been error in the Judge not to have reduced it to writing—the statute requiring him "to reduce every word of his charge to writing before it is delivered to the jury, and all subsequent instructions which may be asked for by the jury, or which may be given by the Judge, shall in like manner be reduced to writing before being delivered to the jury." If this be true, why is it not error just preceding his written charge? The very object of the statute, to prevent any oral instructions to the jury by the Judge, would be defeated by postponing the formality of the reading of his written charge until he is through with his oral instructions.

The reason of the law was that all that was said to the jury in regard to the case might

appear before the appellate Court just as it occurred in the trial Court. It results, therefore, that the oral instruction or statement given should have been embodied in the written charge. But it is insisted that the action of the Court was not excepted to at the time, and a new trial was not asked, for such error on the part of the Court, and, on account of this failure, no exceptions can be taken here. The entry upon the minutes simply recites that the motion for a new trial was overruled, and no reasons for the new trial were set forth either in the entry or in the bill of exceptions. The plaintiff in error may assign any reason, in this Court, appearing in the record as a ground of error when the record simply shows the motion for a new trial was made and overruled.

The judgment for this error will be reversed, and case remanded for a new trial, and defendant in error will pay the cost.



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State v. Hawkins.

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## STATE v. HAWKINS.

(Nashville. January 16, 1892.)

1. BILL OF EXCEPTIONS. *Essential in Chancery cause tried by jury.*

If a cause has been determined in Chancery Court by jury trial, the charge of the Court, and the evidence and affidavits introduced in the lower Court, cannot be considered upon appeal to this Court, though copied into the transcript by the Clerk, unless they have been made part of the record by proper bill of exceptions.

Code construed: §§ 3872, 3873 (M. & V.); §§ 3155, 3156 (T. & S.).

Cases cited and approved: James v. Brooks, 6 Heis., 150; Bank v. Oldham, 6 Lea, 729; Railroad v. Foster, 88 Tenn., 671.

2. SAME. *Papers that are not part of.*

Papers copied into transcript that do not purport to be part of bill of exceptions constitute no part of the record.

3. SAME. *Want of Judge's signature fatal.*

Unless bill of exceptions has been duly authenticated by the trial Judge's signature, it cannot be treated as part of the record, although there be a recital in the record that the bill of exceptions had been signed by the Judge and made part of the record.

Cases cited and approved: Garrett v. Rogers, 1 Heis., 320; Wynne v. Edwards, 7 Hum., 419.

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FROM CANNON.

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Appeal from Chancery Court of Cannon County.  
B. M. WEBB, Ch.

Attorney-general PICKLE and MURRAY & SPURLOCK  
for State.

JONES & HOUSTON and JAMES H. CUMMINGS for  
Hawkins.

LURTON, J. The cases of the *State v. J. B. Hawkins and Wm. McMahon* and *State v. J. B. Hawkins and J. B. Smith* were consolidated and ordered to be heard together.

A decree of the September Term, 1890, recites that the attorneys for the State demanded a jury to try the issues of fact to be submitted, and that a jury was duly impaneled and sworn to try the issues tendered and a true verdict render.

The bills of the State alleged, in substance:

*First.*—That an application was made to the Comptroller for pensions, under the Act of 1887, by the defendants J. B. Smith and Wm. McMahon; that J. B. Smith represented in his application, and affidavits accompanying the same, that he had lost the use of both of his legs while engaged in actual service of the Confederate Government, and had continued without the use of his legs ever since.

That Defendant McMahon, in his said application and accompanying affidavits, alleged that he had lost both of his eyes while engaged in the same service, and had remained blind since.

*Second.*—That the representations in said applications were in fact wholly false and untrue, and

that the said Smith had not in fact lost the use of his legs, nor the said McMahon the use of his eyes.

*Third.*—The bills further charged that the defendant, Hawkins, as Chairman of the County Court of Cannon County, did indorse upon said applications and certify to the Comptroller that he had examined said applicants for pensions, and also the witnesses making the affidavits in support of the applications, and from his said examination the applicants came within the provisions of the Act, and were entitled to the pensions as provided by law; that at the time of making this certificate the said Hawkins knew the same was false, and that Smith still had the use of his legs and McMahon the use of his eyes.

*Fourth.*—That in addition to these false certificates said Hawkins personally presented said applications and affidavits to the Comptroller, and represented to that officer that of his own knowledge he knew the facts stated in the applications and affidavits to be true.

*Fifth.*—The bills allege that by reason of these false and fraudulent applications, certificates, indorsements, and representations, a pension had been granted to each of the applicants, and \$825 had been thus fraudulently obtained from the State by Defendant Smith, and \$1,325 by Defendant McMahon.

*Sixth.*—That said Hawkins had been induced to aid said fraudulent applications, and to make false

certificates and representations, upon an agreement and understanding that he was to receive a pecuniary compensation out of the fund to be derived thereby. The bills sought decrees against Smith and Hawkins, and McMahon and Hawkins for the sums thus obtained. The issues of fact submitted to the jury involved the truth or falsity of every question of fact presented by the issues made in the pleadings. Upon evidence submitted the jury found that the applications and accompanying affidavits were true; that the certificate made by Defendant Hawkins was true; that the affidavits presented by said Hawkins to the Comptroller were true, and not false as charged. They also found that said Hawkins had received nothing to influence him to sign the certificates or procure the pensions. A decree in the cause recites in full the findings of fact by the jury, and then proceeds as follows: "When the Court is of opinion that the findings of the jury upon the facts are correct. The Court is of further opinion that the allegations of the bill are met and denied by the answer and not sustained by the proof." The bills in the two cases were therefore dismissed. From this decree the relator has for the State prayed and obtained an appeal. From what we have stated it must be manifest that unless the evidence heard by the jury and the charge of the Court are properly parts of the transcript that this appeal must prove ineffectual. Section 3872 (M. & V.) provides for a broad appeal "from the judgment or decree of the Circuit

or Chancery Court, in a matter of equity tried according to the forms of the Chancery Court," and that in such case the appellant shall "have a re-examination" in this Court of "the whole matter of law and fact appearing in the record."

By the next section the following provision is made: "Issues of fact in Chancery, made up on demand of either party, and tried by jury according to the forms of a Court of Law, are not embraced in the foregoing section, and errors in the proceedings therein can only be corrected as errors are corrected in actions at law."

This provision has been construed as requiring that the verdict of a jury on issues of fact submitted to them in Chancery shall be given the same weight as in a Court of Law, and that until set aside it is equally conclusive. It has also been construed as requiring the dissatisfied party who seeks a correction of errors, either in the admission or exclusion of evidence or in the charge or in the refusal of a new trial, to make up a bill of exceptions as at law. . *James v. Brooks*, 6 Heis., 150; *Bank v. Oldham*, 6 Lea, 729.

Neither the evidence nor the charge nor the rulings on evidence have been made a part of the record by bill of exceptions. The decree granting appeal does recite that the appellant tendered his bill of exceptions, which was ordered to be made part of the record. This is the usual judgment entry, but in fact no bill of exceptions appears to have been signed by the Chancellor. An enormous

mass of evidence, consisting in part of depositions and in part of what purports to have been oral evidence, is embraced within the transcript.

On page 49, preceding this evidence, is such a recital as usually precedes a bill of exceptions, being a recital that "on the trial of the issues submitted to the jury in this cause, the following issues of fact and oral proof was introduced by the complainant." Then follow indiscriminately depositions, interlocutory rulings, affidavits, and oral evidence.

On page 367 this evidence concludes without any statement that this was the whole of the evidence submitted to the jury, or any signing of the same as a bill of exceptions, or statement that it is intended as such. This is immediately followed by the caption of the Court, and then by a decree setting the causes for trial on a particular day of the term. This is followed by a decree ordering an attachment to issue for a derelict witness, and this by an affidavit of counsel asking for an attachment, and this by the writ of attachment and return thereon. Next comes a paper styled "charge of the Court." This charge is signed "B. M. Webb, Chancellor." But nothing here purports to make it, nor the evidence preceding, a part of a bill of exceptions.

We are therefore constrained to hold that neither the evidence nor the charge nor the action of the Court upon the motion to discharge a juror, are properly parts of the record.

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State v. Hawkins.

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Merely copying a charge into a transcript has been repeatedly held as not making it a part of the record. It must be made so by bill of exceptions. *Railroad v. Foster*, 88 Tenn., 671, and cases cited.

We have no authentication by the Judge of what the Clerk has inserted as evidence heard by the jury. A bill of exceptions, not signed by the Judge as a bill of exceptions, cannot be treated as a part of the record, though there be record recital that one was signed and made a part of the record. *Garrett v. Rogers*, 1 Heis., 320; *Wynne v. Edwards*, 7 Hum., 419.

Decree affirmed. State will pay all costs of cause.

## DAVIS, Adm'r, v. GARRETT.

(Nashville. January 21, 1892.)

1. GIFT. *Of slave by deed valid without delivery.*

The gift of a slave or other chattel made by deed duly executed and delivered is valid and effectual between the parties without delivery of the thing given—*e. g.*, a father's deed of gift of a slave to his infant daughter passes title to the daughter without actual delivery of the slave, the daughter and slave being members of the donor's household and remaining in his family until the latter was emancipated.

Cases cited and approved: *Caines v. Marley*, 2 Yer., 582; *McEwen v. Troost*, 1 Sneed, 186.

2. DEED. *Proof of delivery.*

Proof of delivery of deed is *prima facie* sufficient, where it is shown that the grantor procured registration of the deed and left it in the register's office during the remainder of his life—the instrument being a deed of gift from a father to his daughter, an infant of tender years residing in his family.

Cases cited and approved: *Martin v. Ramsey*, 5 Hum., 350; *Corley v. Corley*, 2 Cold., 524; *Thompson v. Jones*, 1 Head, 576; *Tompkins v. Bamberger*, 3 Lea, 576.

Cited and distinguished: *Mason v. Holman*, 10 Lea, 315.

3. SAME. *Same.*

And from the unexplained fact of registration it will be presumed that it was done by the grantor's procurement and authority.

4. INFANT. *Acceptance of deed.*

Infant's acceptance of deed will be presumed, if, viewing the transaction as of the date of the deed, it clearly appears to have then been for his benefit that it should be accepted.



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Davis, Adm'r, v. Garrett.

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5. SAME. *Same.*

After the infant's acceptance of a deed has once attached in contemplation of law, the subsequent loss of the property conveyed cannot annul that acceptance.

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FROM MARSHALL.

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Appeal from County Court of Marshall County.  
W. J. LEONARD, J.

COWDEN & TURNEY for Mrs. Daniel.

P. C. SMITHSON for Mrs. Bryant.

LURTON, J. This case is here alone upon the appeal of Mrs. Cordelia Bryant from a decree of the County Court charging her with the value of a negro slave as an advancement. In 1859 Mrs. Bryant's father made to her a deed of gift to a slave girl nine years of age.

The donee at date of this deed was but about seven years of age, and residing with her father, where she continued to reside until her marriage more than ten years afterward. The subject of the gift was then and continued upon the premises of the donor until she voluntarily left after close of the Civil War and her emancipation.

This deed was signed by the father and attested by three witnesses. A few days after its date the

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donor personally acknowledged its execution before the Clerk of the County Court, and within a few days thereafter he caused it to be registered. After registration the original deed was left in the Register's office, where it was found pending the trial of the questions arising upon an account of advancement.

The objections urged to the decree charging this gift as an advancement are:

*First.*—That the slave was never delivered into the possession of the donee. Possession must be according to the nature of the thing given and the circumstances and situation of the parties and subject. Here the donor was the father. The donee was his own child, of tender years and residing with him. The subject of the gift was a young female slave, a member of his own household. The child had no trustee or guardian other than her natural guardian, her father. Under such circumstances, no actual, manual delivery was possible. He could only make the gift by executing such legal instrument as was necessary, under the law, to pass the title.

The gift of a chattel or slave by deed duly executed and delivered is valid at the common law though there be no actual delivery of the thing given. This has long been regarded as settled by our decisions. *Caines v. Marley*, 2 Yer., 582; *McEwen v. Troost*, 1 Sneed, 186.

In the case last cited the facts were that Dr. Troost executed a deed of gift to his two children,

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conveying a valuable geological cabinet and library, and caused the deed to be registered. He remained in possession until his death. In a contest over the title between the donees and the administrator of the father that of the donees prevailed.

*Second.*—It is next urged that the deed was never delivered. This deed was either registered by direction of the donor or by direction of some one to whom he had delivered the deed. One of these propositions must be presumed from the unexplained fact of actual registration. Assuming the registration to have been the act of the donor as the most probable, it is urged that this is not delivery.

Delivery of a deed is undoubtedly essential to its due execution as a deed. But it has been repeatedly held that this delivery need not be formal, or into the hands of the grantee or some one for him, if the circumstances are such as to make it clearly appear that the intention of the maker was that the deed should take effect without such delivery. *Martin v. Ramsey*, 5 Hum., 350; *Corley v. Corley*, 2 Cold., 524.

Whether the mere execution of a deed and delivery to the Register would amount to a delivery was stated to be a question of doubt by Judge Caruthers in *Thompson v. Jones*, 1 Head, 576. This doubt seems to have deepened by the intimation of Judge Cooper in *Thompkins v. Bamberger*, 3 Lea, 576.

It may be assumed from our cases that the

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mere leaving a deed in the office for registration, without other circumstances, would be insufficient evidence of a delivery to the grantee. Yet, if it appear that the grantor directed it to be recorded, "we should consider that equivalent to actual delivery and acceptance," said Judge Totten in *McEwen v. Troost*. In the subsequent case of *Thompson v. Jones*, this language was considered by the Court, and the conclusion reached that "the execution of the deed and procuring its registration would not be conclusive of delivery; but it would devolve upon the other side the necessity of proving that she did not intend it as a final delivery, but that it was her purpose still to hold it in her power, and that it should not take effect while she lived, or only upon some condition or contingency." 1 Head, 576.

The case of *Mason & Holman v. Holman*, 10 Lea, 315, has been strongly relied upon by counsel for appellants as holding that registration of a deed of gift by the grantor is not sufficient evidence of delivery. That case goes to the verge of the law, and should be limited to its facts. The opinion does not overrule the two cases we have just cited, nor refer to them. There, though the donor did register the deeds, yet it is shown that after registration he recovered the original deeds and held them in his possession until death. The case is to be further distinguished in that there was evidence of a prior parol gift upon terms differing from those contained in the deeds. The

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donees were married women, and are shown to have known nothing of the deeds. Here the deed was suffered, after registration, to remain in the Register's office. The donee was incapable, of understanding the transaction, and a formal delivery of the deed to her would have been so extremely formal as to have been farcical.

The latest case on the subject is that of *Swiney v. Swiney*, 14 Lea, 316. There the Court re-affirmed the doctrine of *McEwen v. Troost* and *Thompson v. Jones*, and held that when the grantor causes the actual registration of the deed, it constitutes a *prima facie* case of delivery. The act of registration, upon direction of the grantor, is highly significant of his purpose to give effect to his deed. He has thereby put it beyond his power to recall the instrument from the public records, and give creditors and purchasers notice of the state of the title. It ought to require strong circumstances to rebut the presumption of delivery arising from such conduct.

If the deed contained any burdensome or unusual provisions, a question might arise as to acceptance by the donee. But when the donee is incapable of exercising any discretion in the matter, and the conveyance is clearly beneficial, the law will presume an acceptance. Were it otherwise, an infant, for want of power, would be incapable of receiving a benefit conferred by deed.

Under the facts of this case, and looking at this transaction as it stood at the date of this

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gift, it was manifestly to the interest of the donee that this gift should be accepted. The subsequent emancipation of the slave cannot affect the judgment of the law upon the facts as they were at the time the deed became operative.

Affirm the decree with costs of appeal.

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Tennessee Manufacturing Co. v. James.

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TENNESSEE MANUFACTURING CO. v. JAMES.

(Nashville. January 26, 1892.)

1. CONTRACT OF HIRING. *Of infant's services by joint contract of parent and child. Emancipation.*

A father and his infant daughter joined in contract, hiring the latter's services to a third person for a stipulated compensation to be paid to the daughter, "subject to all the conditions of this contract." The contract of hiring contained a condition that the employe should give two weeks' notice of her intention to quit, and that for her failure to give such notice, or to continue work during the two weeks, she should forfeit a stipulated amount as liquidated damages, to be deducted out of her wages then due. The daughter quit service without excuse and in violation of this condition, and sued to recover for value of her services independently of this contract. The employer interposed this contract as defense to the extent of the stipulated damages.

*Held*—That the daughter's emancipation was only partial and conditional, and that the stipulation for liquidated damages, if otherwise fair and reasonable, was valid and binding as the father's contract under his reserved right in the contract to his daughter's wages.

Cases cited: *Cloud v. Hamilton*, 11 Hum., 105; 35 Am. Rep., 117.

2. SAME. *Example of valid stipulation for liquidated damages.*

The stipulation in a contract of hiring that the employe quitting service without excuse and without giving a specified, reasonable notice of his intention to quit shall forfeit to his employer a specified amount, reasonable in itself and duly proportioned to the wages received by the particular employe, will not be held void as a contract for a penalty, but treated as a valid and reasonable stipulation for liquidated damages where the employe had service in a large manufacturing establishment that employed many hands, who were divided into sev-

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eral classes dependent upon each other, and where, in the particular case, no data existed from which the actual damages inflicted could be ascertained.

Case cited and distinguished: Schrimpf v. Tennessee Manufacturing Co., 86 Tenn., 219.

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FROM DAVIDSON.

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Appeal in error from Circuit Court of Davidson County. W. K. McALISTER, J.

DICKINSON & FRAZER for Tennessee Manufacturing Co.

E. J. WICKWARE for James.

LURTON, J. Minnie James, a minor, was an employe of the appellant, a corporation engaged in the manufacture of cotton goods. The contract of employment was in writing, and was with the minor and her father. By one of the provisions of this contract it was stipulated that the employe should give two weeks' notice of her intention to quit. It is further provided that in case she should leave without giving two weeks notice, "or fail or refuse to faithfully work during a period of two weeks after giving notice of an intention to leave, \* \* \* then it is hereby agreed that the amount stated below for the class to



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which I may belong is agreed upon as liquidated damages due said Tennessee Manufacturing Company at the time of my failure to comply with the terms of this contract, to compensate it for all damages, both actual and exemplary, and all loss arising from my failure to carry out the terms of this agreement; and it is further agreed upon that said amount, applicable to the class of employes to which I may belong, shall be deducted from any sum which may be due me by said company, whether on account of services rendered or otherwise."

The class to which appellee belonged was that of those receiving fifty cents per day and under one dollar. The damages stipulated for this class was ten dollars. At the foot of this agreement, which was signed by appellee, was this further agreement signed by her father:

"The foregoing agreement has been read by me, and, fully understanding the same, it is also agreed to by me as binding both me and my daughter, Minnie James, who is legally disqualified from making this contract, to all its terms and conditions. I agree further, that said Minnie James is hereby authorized to receive the wages of said work, and that all sums paid to said employe are to be accepted as fully discharging all liability, to the full amount so paid, and said wages are to be subject to all the conditions of this contract as though said employe was legally empowered to act in person."

Appellee gave notice of her intention to leave, and thereafter worked ten days, but at the end of that time quit without any excuse. At the time she quit there was due her twenty days wages, including the ten days after her notice.

If the stipulation as to damages is invalid, then the company is due her ten dollars; if valid, then nothing is due her. Upon quitting she brought suit, by her father as next friend, upon a *quantum meruit*. The contract has been set up as a defense to her suit.

The Circuit Judge being of opinion that the contract was invalid, as being one with a minor who had a legal right to repudiate same, gave judgment for the plaintiff. In this we think his Honor erred. If the contract had been alone with the minor, she might undoubtedly repudiate it and recover upon a *quantum meruit*. The law would give the infant the privilege of judging whether such a contract was beneficial or not, and of avoiding it if she elected to do so, and recovering the value of her services as if she worked without any contract. Am. & Eng. Ency., Vol. X., title Infant.

But this contract was in law with the father, who agreed that the wages, in law due to him, might be paid over to his child, "*subject to all the conditions of this contract.*" The wages of a minor, peculiar circumstances out of the way, are due to the father. This springs from his legal duty to support and educate his child. He may permit

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the minor to take and use his own earnings. This is called emancipation, and emancipation will be a defense to the father's suit for the minor's wages. It may be express or implied, entire or partial. It may be conditional. It may be in writing or oral; for the whole minority, or for a shorter term; as to a part of the child's wages or as to the whole. Emancipation will not enlarge the minor's capacity to contract; it simply precludes the father from asserting his claim to the wages of his child. Bishop on Contracts, Sec. 898.

If one employ a minor with notice of the non-emancipation of the infant, it will be no defense to the father's suit for the wages that the child has received them. On the other hand, payment to the father will be no defense to the minor's suit if the employer knew of the fact of emancipation. These principles of the common law are well settled, and have not been affected by statute. *Cloud v. Hamilton*, 11 Hum., 105.

The cases in America are collected in a note to *Wilson v. McMillen*, 35 Am. Rep., 117. In view of these principles, we must construe the contract of the father as an emancipation subject to the conditions as to damages in case his child shall quit without cause and without the stipulated notice. It is as much as if he had said: "My child is a minor. As such I am entitled to her wages. I am willing that she shall work in your mill, and that the wages she may earn shall be paid to her. I agree that she shall comply with

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this contract, and if she does not, then the wages legally due me shall be detained by you to the extent provided in the contract I make for her; and only such wages paid to her as I would be entitled to receive if the contract were exclusively with me." This was a conditional emancipation under a special contract made by and with the father for himself and his child. Her emancipation was partial. The father, having a legal right to her entire wages, has stipulated that none shall be paid her beyond the sum due under this agreement with him. If this contract is binding on him, the minor cannot recover beyond its limits. If the contract is invalid as to him, as stipulating for a penalty, then it will not be in the way of plaintiff's suit.

We agree with the Circuit Judge in holding that this contract does not fall within the case of *Schrimpf v. Tennessee Manufacturing Co.*, 86 Tenn., 219. That case concerned a contract construed as stipulating for a penalty in case of a breach. It was held not to be an agreement for liquidated damages, because the forfeiture covered all the wages due at time of breach, regardless of amount due, and regardless as to whether the arrearages were the consequence of the default of the company. It was a contract harsh and unconscionable. It preserved no proportion between sum forfeited and the actual damages, and put all employees upon same footing, whether much or little was earned, much or little due when breach occurred. The

damages were to be all that was due in any case. To one this might have been the wages of months, to another the earnings of but a day. But in that case Chief Justice Turney quoted and indorsed the language of Campbell, Judge, in *Richardson v. Wochler*, 26 Mich., 90, where he said: "We have no difficulty in holding that the injury caused by the sudden breaking off of a contract of service by either party involves such difficulties concerning the actual loss as to render a reasonable agreement for stipulated damages appropriate. If a fixed sum, or a maximum within which wages unpaid and accruing since the last pay-day might be forfeited, should be agreed on, and shall not be unreasonable or an oppressive exaction, there would seem to be no legal objection to the stipulation if both parties are equally and justly protected."

Applying these principles to the case for judgment we have no difficulty in holding that the stipulation here is for liquidated damages and not for a penalty, and that the contract is neither unreasonable nor oppressive. "The tendency and preference of the law is to regard stated sums as a penalty, because actual damages can then be recovered, and the recovery limited to such damages. This tendency and preference, however, does not exist where the actual damages cannot be ascertained by any standard. A stipulation to liquidate damages in such cases is considered favorably."

1 Sutherland on Damages, 490.

This contract of employment on its face affords

no data by which the actual damages likely to result from its non-observance can with any certainty be ascertained. Such a circumstance has been regarded as justifying the Courts in holding the sum stipulated as liquidated damages.

The plaintiff in error was a cotton mill, having in its employment hundreds of hands. The work is divided into many departments. The raw material is handled by one set of hands and put in condition for another, and the second department still further advances its manufacture; and so on through successive stages of progress. The evidence shows that each department is dependent upon that immediately below it. Now, if the operatives of one department quit, or their work is delayed, its effect is felt in all to a greater or less degree. It is also shown that it is not always easy to replace an operative at once, and that the unexpected quitting of even one hand will to some extent affect the results throughout the mill. Yet the evidence shows that it would be impossible to calculate with any certainty the precise, actual loss due to an unexpected breach of an employe's engagement; though it is shown that there are some departments of work where the quitting of a small number of hands, without notice, would stop the entire mill and throw other hundreds out of employment. In this day of great factories, and the consequent division of labor into separate departments, a degree of interdependence among employes exists which they ought and do recognize, and

which makes the obligation of each to the whole and to the common employer all the more important. The case is one, then, where the certainty of some damage, and the uncertainty of means and standards by which the actual damage can be ascertained, requires the Courts to uphold the contract as one for liquidated damages and not as providing for a penalty. The sum fixed is certain. It is proportioned to the earning capacity of the employe, and hence presumably with regard to the particular results of a breach in each department.

There is no hardship in the agreement requiring two weeks' notice. If the operative leaves for good cause, the contract would not apply. If able to work, the pay continues until notice has been worked out.' That she returned the next day after quitting, and offered to work out her notice, is no compliance. The mischief had been done. She had voluntarily, and without pretense of excuse or asking to be released, gone off, and left her work standing, and endeavored to get others to go with her. The damages had accrued, and, under the facts of this case, appellant was not bound to restore her.

Reverse. Judgment here for plaintiff in error.

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 Glasgow v. Turner.
 

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GLASGOW v. TURNER.

91	163
110	128

(Nashville. January 26, 1892.)

**I. FRAUDULENT CONVEYANCE.** *Farming contract between father and son held valid.*

A father, being very old and infirm, and having a large dependent family, but no property except a small farm and some live-stock, made a verbal contract with his son, a young man living in his family, that the latter should cultivate the farm for a year and out of the crop support the entire family and feed the live-stock and take the residue for his compensation. The father and a younger son gave some assistance in the cultivation of the crop, which yielded about one hundred barrels of corn, worth \$200. There was no intentional fraud. The father's creditors sought to subject the corn crop to payment of their debts.

*Held*—The corn crop belonged to the son, charged with the support of the father's family, and that the father's creditors could not assert any claim to it.

Case cited and approved: *Leslie v. Joyner*, 2 Head, 515.

**2. SUPREME COURT.** *Renders final judgment upon reversal of law cause, when.*

Upon reversal of a law cause tried by the Circuit Judge without intervention of a jury, on the sole ground that there is no evidence to support the Judge's finding upon the facts, this Court will render final judgment in favor of the plaintiff in error.

Cases cited and approved: *Smith v. Hubbard*, 85 Tenn., 306; *Singleton v. Wilson*, 85 Tenn., 347; *Settle v. Marlow*, 12 Lea, 474.

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 FROM STEWART.
 

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Appeal in error from Circuit Court of Stewart County. A. H. MUNFORD, J.



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Glasgow v. Turner.

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J. W. RICE for Glasgow.

J. W. STOUT and S. C. LEWIS for Turner.

CALDWELL, J. This is an action of replevin, involving the right to the possession of fifty barrels of corn. The Circuit Judge, trying the case without a jury, rendered judgment in favor of the defendant, and plaintiff appealed in error.

John Glasgow owned a small farm, some horses, cattle, and hogs in Stewart County. Being old, and having a large family dependent upon him, he placed the farm and live stock in charge of his son, C. A. Glasgow, in the spring of 1890, under a verbal agreement, whereby the son bound himself to cultivate the farm and support his father's family and feed the stock out of the crop raised, taking the residue as compensation for his labor.

The son was a young man, living in his father's family upon the farm.

In pursuance of the contract, the son, by his own labor and that of a hired hand, with some little voluntary assistance from his father and younger brother, cultivated a crop of corn, which yielded about one hundred barrels, worth two hundred dollars.

Such is the substance of the material facts, as detailed by the plaintiff, who was the only witness in the case.

A part of the corn is the subject-matter of

this litigation. Having been seized under execution against the father, the son brought this action, claiming the corn as his own.

The trial Judge was of opinion that the contract was fraudulent in fact and in law, and, as a consequence, adjudged the corn to be the property of the father, and subject to his debts.

In that view we cannot concur upon either ground. There is *no* evidence, not even an intimation or indication, direct or remote, of an *intention* to hinder, delay, or defraud creditors. Hence, the contract cannot properly be held to have been fraudulent in fact.

It is true, as contended by counsel of appellee, that the finding of the trial Judge upon the facts of the case is entitled to the same weight as the verdict of a jury; but neither is binding upon this Court, unless there be some material evidence to support it. *Eller v. Richardson*, 5 Pickle, 576.

As we have already seen, there is *no* evidence of a fraudulent intent in this case. Therefore, the finding of fraud in fact is without support, and cannot control the decision here to be made.

The other ground of the trial Judge's action involves a question of law; and upon that, as upon the facts, we cannot assent to his conclusion. The contract did not contravene any rule of law or public policy. Consequently, it could not have been fraudulent in law.

In our judgment, a more natural, fair, and honest arrangement could not have been made by par-

ties situated as these were. John Glasgow was under obligation, both legal and moral, to provide a support for his family; yet he was unable to do so by his own labor. It was allowable for him to make any *bona fide* use or disposition of his property for that purpose. He might lawfully have sold a sufficiency of his property and lived upon its proceeds; but instead of that he let the temporary use of his farm and stock to his son, and thereby gained a support for himself and family without any appreciable diminution of his estate. In that way he preserved the *corpus* of his estate, which otherwise must have been encroached upon; and by an honest arrangement actually benefited instead of injuring the creditor.

It is apparent from the crop produced that the plaintiff was shown no great favor by the contract. Indeed, it is to be doubted that one occupying a different relation would have entered into an arrangement with so little promise of compensation for the labor to be performed.

Left in idleness, the farm could have yielded nothing. The old gentleman was not able to cultivate it himself, and thereby save the small surplus of the crop for his estate. Had he been able but unwilling, that would have furnished no ground for legal complaint, for a debtor cannot, under our law, be coerced to work for the benefit of his creditor.

Again, no property of the debtor was incumbered, covered up, or placed beyond the reach of

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Glasgow v. Turner.

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the creditor by this contract. No title to any thing except the crop to be raised was attempted to be passed to the plaintiff. Such of the land and live stock, if any, as may have been subject to the claim of creditors when the contract was made remained in the same attitude after it was made.

Good morals, law, and public policy alike commend such contracts under such circumstances.

A farming contract between father and son, very much like the one before us, was upheld and enforced by this Court in the case of *Leslie v. Joyner*, 2 Head, 515.

All the corn belonged to the plaintiff, charged with the support of the family of his father. It was in no sense subject to levy for the father's debt.

The case having been tried by the Circuit Judge without the intervention of a jury, this Court, upon reversal, directs such judgment as he should have rendered. *Smith v. Hubbard*, 1 Pickle, 306; *Singleton v. Wilson*, *Ib.*, 347; *Settle v. Marlow*, 12 Lea, 474.

Reverse and enter judgment for plaintiff.

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Montague v. Thomason.

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91	168
110	129

## MONTAGUE v. THOMASON.

(Nashville. January 28, 1892.)

1. WITNESS. *Transactions with, and statements by, deceased person that a party may not testify to.*

In suit upon note by the administrators of the payee against the makers thereof, it is not competent to prove by one of the defendants that he had satisfied the note sued on, by sending by mail, or otherwise delivering to the payee, a renewal note and some cash, pursuant to instructions and authority contained in a letter of the payee, which had been received by the defendants, and unintentionally lost or mislaid.

Code construed: §§ 4563, 4565 (M. & V.); §§ 3813c, 3813d (T. & S.).

Cases cited and approved: Key v. Holloway, 7 Bax., 579; Hill v. McLean, 10 Lea, 115; Jones v. Waddell, 12 Heis., 338.

2. SAME. *May prove existence and loss of letter.*

But a defendant may, in such case, state that he had a letter from plaintiff's intestate, and that it is lost; but he cannot testify to its contents.

Case cited and approved: Mason v. Spurlock, 4 Bax., 563.

3. SAME. *Competency of agent of living party.*

And in such case the agent of the defendants, if not himself sued, may testify on behalf of his principals to any transactions he may have conducted for them with plaintiff's intestate, and to any statements the deceased made in his presence.

Cases cited and approved: McBrien v. Martin, 87 Tenn., 13; Fuqua v. Dinwiddie, 6 Lea, 645; Reiley v. English, 9 Lea, 19; Kelton v. Jacobs, 5 Bax., 574; Hudgins v. Fanning, 4 Bax., 578.

Cited and distinguished: Cottrell v. Woodson, 11 Heis., 681.

4. SUPREME COURT. *Affirms judgment in law cause based in part upon incompetent evidence, when.*

This Court will affirm judgment in a law cause determined by the lower Court without the intervention of a jury, although incompetent evi-

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Montague v. Thomason.

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dence was admitted over objection and considered on the trial, if it appears, upon a survey of the entire record, that the judgment is correct upon the competent evidence, after excluding from consideration all the incompetent evidence.

Cases cited and approved: *Wheeler v. State*, 9 Heis., 393; *Fogg v. Gibbs*, 8 Bax., 469; *Smith v. Hubbard*, 85 Tenn., 306.

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FROM WAYNE.

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Appeal in error from Circuit Court of Wayne County. E. D. PATTERSON, J.

JNO. F. MONTAGUE and PITTS & MEEKS for Montague.

R. A. HAGGARD for Thomason.

CALDWELL, J. This is an action on a promissory note. The Circuit Judge tried the case without a jury, and rendered judgment for defendants. Plaintiffs appealed in error.

The note sued on is as follows:

"\$158.00. On or before the twenty-fifth day of December next we, or either of us, promise to pay to the order of A. T. Hossell one hundred and fifty-eight dollars, for value received.

"This January 24, 1889.

"S. J. THOMASON,

"R. T. CHAPPELL,

"F. M. THOMASON,

"W. L. BELL, SEN."

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Montague v. Thomason.

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A. T. Hossell, the payee, died testate, and his executors, Montague and Buchanan, finding the note among the valuable papers of their testator, brought this suit against the makers to enforce collection.

Defendants admit the execution of the note, but insist that it was paid to the testator by the execution of another note in renewal thereof. The alleged renewal note is in these words and figures: "\$158.00. WAYNESBORO, TENN., Dec. 25, 1889.

"Twelve months after date we promise to pay to the order of A. T. Hossell one hundred and fifty-eight dollars, value received.

"S. J. THOMASON,

"F. M. THOMASON,

"R. T. CHAPPELL,

"W. L. BELL."

This note also came to the hands of the plaintiffs as an asset of their testator, and was by them collected from the defendants before the commencement of this suit.

The evidence introduced by defendants, if competent, clearly established their contention, and justified the judgment of the trial Judge. Plaintiffs insist, however, that all the evidence tending to show payment by renewal was incompetent, and that its admission over their objection was improper and erroneous.

Defendant F. M. Thomason went on the stand in his own behalf and testified, over objection, that he received a letter (which he had lost) from A.

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Montague v. Thomason.

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T. Hossell, authorizing a renewal of the note sued on by prepayment of interest and execution of another note for same amount and signed by same persons, and promising to send him, as satisfied, the note sued on, when the renewal note should be delivered; that he (Thomason), in pursuance of that letter, caused the second note above set out to be executed in payment and renewal of the note sued on, and sent it, with the interest, to Hossell by mail; that for some reason unknown to him, Hossell failed to send him the renewed and satisfied note as promised in the letter.

Though Thomason was not disqualified to speak as a witness by the mere fact of being a party to the suit (Code (M. & V.), § 4563; *Key v. Holloway*, 7 Bax., 579; *Hill v. McLean*, 10 Lea, 115; *Jones v. Waddell*, 12 Heis.; 338), he was incompetent to testify "as to any transaction with or statement by" Hossell, testator of plaintiffs. The language of the statute is as follows:

"In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party." Code, § 4565.

Obviously the disqualification extends to and embraces every *transaction with or statement by* the deceased, whatever be its nature, and whether oral



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or in writing, the prime object being to put litigant parties upon equal footing in the Courts, and prevent the living from testifying against the dead. The testimony of Thomason includes both a *transaction with* and a *statement by* the deceased, and, consequently, is doubly incompetent—within the prohibition of the statute in a two-fold sense. He testifies to the extinguishment of the note sued on by the execution and delivery of another note in its stead. If that was not a transaction, it would indeed be impossible to state what would constitute a transaction between the maker and payee of a note. Having been participated in by both of them, as parties in interest, it was manifestly a *transaction by* the witness *with* the deceased, and *vice versa*. As an important link in the transaction, Thomason details the proposition made by Hossett, the contents of his letter, which of necessity was a statement by the deceased, if written or authorized by him.

That the exchange or novation of notes was accomplished by means of written correspondence between the parties signifies nothing in determining the competency or incompetency of Thomason's testimony. A written transaction with or statement by a deceased person is no more a matter about which the adverse party may testify than a verbal transaction or statement. The statute makes no distinction. Its prohibition, on the contrary, is general, not limited to transactions and statements of one kind or the other, but comprehend-

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ing both. No transaction with or statement by a deceased person is excepted; but all such are included; hence, the only way to reach a construction different from that herein announced would be through the unwarranted assumption that the words *statement* and *transaction*, in their proper use, relate alone to things said and done verbally. Webster defines a transaction as "the doing or performing of any business; the management of an affair." Effecting the novation of notes, whether by word of mouth or through written correspondence, is, unquestionably, the doing or performing of a matter of business, the management of an affair; therefore, it is a transaction, whether accomplished by the one mode or the other.

The same author defines statement thus: "The act of stating, reciting, or presenting, verbally or on paper."

To limit the disqualification to verbal transactions and statements would do the greatest violence to both the letter and spirit of the statute, and place the estates of dead persons, which it was designed to protect, at the mercy of corrupt parties. Even doubtful language would be so construed as to avoid such a result.

Preliminary to the introduction of other proof, it was competent for Thomason to state, as independent facts, that he at a particular time possessed a written instrument or letter, and that it had been unintentionally lost (see intimation to this effect in *Mason v. Spurlock*, 4 Bax., 563);

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but if claimed to have been written by Hossell, deceased, he was not competent to testify as to its contents, or to prove by his own oath what he did in response thereto.

R. T. Chappell, another defendant, testified, in general terms, that the note in suit was paid in the life-time of Hossell by the execution of the second note, herein described, in renewal thereof. This evidence should have been rejected. The novation stated by the witness was so clearly a *transaction* with the deceased, and the testimony so plainly within the prohibition of the statute, as not to admit of discussion or elaboration.

Will Thomason, a son of Defendant F. M. Thomason, was also introduced by the defendants. He testified that he went to see Mr. Hossell, at the instance of defendants, and inquired if he was willing for them to renew the note sued on; that Mr. Hossell said he was willing to the desired renewal, and would wait on the defendants one year longer for the final payment of the debt if they would prepay the interest and put the same parties on the new note; that he told witness, at the same time, that he would send the new note to F. M. Thomason by mail, to be properly signed and returned, after which he (Mr. Hossell) would surrender the old note.

Though objected to, this evidence was properly received, being both competent and relevant. The contention that it was incompetent because the interview occurred while the witness was acting as

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agent of the defendants is unsound. The statute applies alone to *parties* to the litigation. Even persons directly interested in the result of the suit (as this witness was not), are not precluded from testifying, if not *parties*. *McBrien v. Martin*, 3 Pickle, 13; *Fuqua v. Dinwiddie*, 6 Lea, 645; *Rielly v. English*, 9 Lea, 19; *Kelton v. Jacobs*, 5 Bax., 574; *Hudgins v. Fanning*, 4 Bax., 578.

The assumption that the agent is disqualified whenever his principal, if representing himself, would have been within the prohibition of the statute, is not justified by the case of *Cottrell v. Woodson*, 11 Heis., 681. It is true that the Court held in that case that a contract with the son, as agent of his father, was a transaction with the father, and, therefore, that the other party to the contract could not give testimony with respect to it in a suit between himself and the personal representative of the father; but the rejected witness was a *party* to the litigation. Had he not been so, he could not properly have been denied the privilege of testifying. Two things must concur to bring a case within the operation of the statute, and authorize the rejection of the evidence: (1) The proposed witness must be a *party* to the suit in such way that judgment may be rendered for or against him; and (2) the subject-matter of his testimony must be some "transaction with or statement by the testator, intestate, or ward."

The witness, Will Thomason, testified further that he saw, in his father's possession, a letter

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Montague v. Thomason.

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from Mr. Hossell, which stated, in substance, the same thing he (Mr. Hossell) had previously told witness about the proposed exchange of notes.

Objection to this evidence was properly overruled—first, because it was allowable to prove the contents of the letter by one not a party to the litigation, after its loss had been shown; and, secondly, because the objection was general.

The note produced by defendants, and shown to have been paid by them to the plaintiffs, as executors of Hossell, is precisely such a note as this witness says Hossell requested in renewal of the note sued on in this case, being for the same amount, signed by the same persons, due in twelve months, and dated as of the day the other note matured.

There is some other circumstantial evidence on both sides of the issue, but nothing else so potent as facts and circumstances already mentioned.

Considering only the competent evidence found in the record, and disregarding that which is incompetent, as is the practice of this Court when the case has been tried below without a jury (*Wheeler v. State*, 9 Heis., 393; *Fogg v. Gibbs*, 8 Bax., 469; *Smith v. Hubbard*, 1 Pickle, 306), we reach the same conclusion the honorable trial Judge did, and affirm his judgment, with costs.

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Railroad v. Dies.

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## RAILROAD v. DIES.

(Nashville. January 30, 1892.)

1. COMMON CARRIER. *Void stipulation against liability for negligence.*

A common carrier is not protected against liability for loss of goods resulting from defects in car, the existence of which affords evidence of negligence, by a stipulation in the bill of lading accepted by the shipper to the effect that he had examined the car for himself, and found it in good order, and accepted it as "suitable and sufficient" for the purpose of his shipment.

2. SAME. *Liability for defects in cars used, though belonging to another.*

A common carrier is liable for loss of goods resulting from defects in car used for transportation, the existence of which imply negligence, although the car belonged to another, and was procured by the carrier for the particular shipment at the special request of the shipper, upon his paying the additional expense, and the shipment was made in its then condition—the car being of a kind acceptable to the carrier, and commonly used in making like shipments.

Case cited: 102 U. S., 452.

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FROM DAVIDSON.

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Appeal in error from the Circuit Court of Davidson County. W. K. McALISTER, J.

BAXTER SMITH for Railroad.

STOKES & STOKES for Dies.

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Railroad v. Dies.

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LURTON, J. Mr. Dies shipped from Nashville a car-load of live stock, destined to San Antonio, Texas. The shipment was upon special terms, contained in a printed live-stock contract. One of the stipulations in this contract was in these words:

"And it is further understood and agreed that said party of the second part has examined and found in good order the car or cars provided by the said party of the first part for the transportation of said animals, and hereby accepts the same, and agrees that they are, as thus provided, suitable and sufficient for said purpose."

There was evidence tending to show that a stallion shipped under this contract sustained injuries, due to a defect in the car, from which it died. There was a jury and verdict for plaintiff.

The Court was asked to charge in reference to the provisions above quoted, "that the live-stock contract that was read in evidence having been signed and held by plaintiff, and he having acted under it, and that by one of the terms of it the plaintiff acknowledges that the car in which the stock was shipped was safe and sufficient, he is now estopped from alleging that it was unsafe and unsuitable."

This was refused. This was not error. Railway companies are common carriers of live stock, and incur the same liability as carriers of other property, subject only to the limitation that they are excused if the loss is attributable to the intrinsic qualities or nature of the animal. But it

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Railroad v. Dies.

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is equally as well settled that they may limit this common law liability as insurers by a special contract, on sufficient consideration, provided such exemption shall not operate to exempt them from the consequences of their own negligence. The duty of a common carrier of freight is to furnish cars suitable and safe. Any failure in this regard which could have been avoided by due care is negligence.

If this agreement to accept this car as safe and suitable is to be construed as estopping the shipper from relying upon the fact that it was not safe or in repair, then the effect of the contract would be to release the carrier from the consequence of its own negligence in furnishing an unsafe vehicle.

If a shipper can conclude himself by his agreement as to the car in which his freight was shipped, he could, for the same reasons, agree as to the suitability and safety of the roadway, engines, etc. Such a contract would be invalid, as operating to cast upon the shipper the duty of inspecting and determining the safety and sufficiency of the means the carrier has provided for the discharge of his public duties. Its necessary effect would be to release it from liability for its own negligence in failing to provide safe and suitable vehicles. The effect of this agreement, as *evidence* of the condition of the car, the defect relied on being quite an obvious one, if it existed at all, was fully covered by the charge as deliv-



ered; and the charge in this respect is not objected to.

The Court was further requested to charge:

“That if the proof shows that the plaintiff was unwilling to accept an ordinary freight-car, such as the defendant could furnish, to ship his stock in, and that he had Mr. Champe to procure a palace horse-car for that purpose from a different company, he (plaintiff) paying that company for the use of its car, that then, and in that case, it was the duty of the plaintiff, or of the company from which he obtained the car, to inspect it and see that it was safe and sufficient for the purpose of shipping his stock in, and it was no part of defendant's duty to do so.”

This was refused. The evidence shows that Mr. Dies did procure the agent of the railway company to get for his use a car known as an Arms' Palace Horse-car. This car was owned by an independent company, who were paid for its use by Mr. Dies. It was brought to Nashville, and here loaded with this stock, and then put in the train of the Louisville and Nashville Company, who had contracted for the carriage of this stock. The place of such cars in modern transportation is well described by Mr. Champe, the agent of the railway company, through whom Mr. Dies contracted for its use. He says:

“It is quite an advantage to defendant to use the said palace cars, and a great deal of stock is shipped that way; the defendant railway company

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Railroad v. Dies.

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procuring for the shipper such cars. These palace stock-cars occupy to the shipment of stock the same place that palace sleeping-cars do to passengers traveling over our road."

The carrier cannot escape responsibility by carrying its freight in cars furnished by or owned by another company. It was a common carrier with respect to this shipment, and it was a matter of no importance who owned or furnished or paid for the particular car into which this stock had been loaded. This has been thoroughly well settled with respect to its liability to passengers.

In the case of *Railway Company v. Ray* the passenger was injured by reason of a defect in a Pullman palace car in which he was riding. Although the car belonged to the Pullman Company, and was in the immediate control of its own agents and employes, yet the Supreme Court of the United States was unanimously of opinion that this car, being a part of the train under the control of the railway company, made the latter liable for any defect in the car whereby one of its passengers was injured. 102 U. S., 452.

So in the case of *Railroad v. Katzenberger*, 16 Lea, the railway company was held liable for the loss by a passenger of his hand baggage, while riding in a sleeping-car under the special care of the servants of an independent sleeping-car company. That the car made a part of the train of the railway company fixed its responsibility as a carrier. The rule applicable to the carriage of

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Railroad v. Dies.

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passengers in the cars of an independent company applies with full force to the carriage of stock in special cars owned by an independent company.

There was no error in refusing to charge as requested. The other errors assigned have been examined, none of them are well taken.

Judgment affirmed.

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 Simmons v. Leonard.
 

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## SIMMONS v. LEONARD.

91	183
110	128

(Nashville. February 2, 1892.)

1. WILL. *Probate of. Sufficient attestation by subscribing witness.*

Although subscribing witness to will of realty did not attest it in the presence of the other witness, nor see the testator sign it, yet his attestation is sufficient if he signed at the request and in the presence of the testator, and after the latter's name had been attached.

Cases cited: Logue v. Stanton, 5 Sneed, 98; Rose v. Allen, 1 Cold., 24; Barte v. Thompson, 8 Bax., 512; Beadles v. Alexander, 9 Bax., 606.

2. SAME. *Same. Insufficient attestation by subscribing witness.*

Although a will of realty is regular in form, having the testator's name attached and attested by two subscribing witnesses, yet it is invalid, if it is disclosed that the name of one of the subscribing witnesses was signed, at his request and in his presence, by a devisee under the will, and without the witness making his mark; and that the witness, who was partially blind, had no means of identifying the will as the paper to which his name had been attached; and that it is doubtful whether the testator had previously attached his name—the witness having attested the paper at the instance of the devisee, and out of the presence of the testator, the latter having previously requested witness to attest a paper of that character for him.

Code construed: §§ 3003, 48 (M. & V.); §§ 2162, 50 (T. & S.).

Cases cited: Ford v. Ford, 7 Hum., 96; Rose v. Allen, 1 Cold., 23; Jones v. Arterburn, 11 Hum., 98; Alexander v. Beadle, 7 Cold., 128; Maxwell v. Hill, 89 Tenn., 588; Guthrie v. Owen, 2 Hum., 202; Davis v. Davis, 6 Lea, 543.

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 FROM MARSHALL.
 

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Appeal in error from Circuit Court of Marshall County. ROBERT CANTRELL, J.

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Simmons v. Leonard.

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W. W. WALKER, P. C. SMITHSON, and W. N. COWDEN for Simmons.

JONES, & MURRAY, J. H. LEWIS, Z. W. EWING, W. LEONARD, and L. A. THOMPSON for Leonard.

CALDWELL, J. This is a contested will case. In February, 1877, Miss Margaret Simmons, who was both old and illiterate, died at her residence in Marshall County, leaving a valuable tract of land and some personalty. In March following a certain paper writing, alleged to be her last will and testament, and making disposition of her entire estate, was admitted to probate, in common form, in the County Court of that county. Dr. John M. Leonard, the principal devisee, was qualified as executor at the same time.

In July, 1887, D. P. Simmons, a brother of the deceased, and other relatives filed a bill in the Chancery Court, alleging that the said instrument was not her last will and testament, and seeking an account with the executor.

In pursuance of the direction of the Chancellor in interlocutory order, complainants sought to make up and try an issue of *devisavit vel non* in the Circuit Court; but the Circuit Judge refused to take jurisdiction because of the pendency of the suit in the Chancery Court.

On appeal in error, this Court decided (5 Pickle, 622) that the Circuit Court alone had jurisdiction to try an issue of *devisavit vel non*, and thereupon remanded the case.

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The Honorable Circuit Judge thereafter tried the issue without a jury, and pronounced judgment in favor of the will. Contestants have appealed in error.

Our first inquiry shall be whether or not Eleazar Cochran and W. F. McDaniel, whose names appear on the propounded instrument as those of subscribing witnesses, make out a case of due and formal execution under the statute. How that is can be determined only by a careful consideration of what they say occurred at the time, the certificate to which their names are attached being in proper form and reciting all necessary facts.

McDaniel testified that he was notified by Dr. John M. Leonard that Margaret Simmons wanted him to witness her will; that he afterward went by Leonard's house, and they went together to her house; that she brought a paper out on the porch and told him she desired him to witness her will; whereupon, he then and there, in her presence and at her request, signed his name to the paper as a subscribing witness; that he, at that time, saw the names of Margaret Simmons, the testatrix, and Eleazar Cochran, the other subscribing witness, upon the paper; that no one was then present except the testatrix, Dr. Leonard, a small negro, and witness; and, finally, the paper in contest being produced, the witness said it was the same to which he subscribed his name, at the time and under the circumstances already detailed.

This witness shows himself to have been com-

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petent, and by his testimony makes a case of due execution, so far as one subscribing witness can make it.

It was not at all necessary that he should see the testatrix sign the paper, nor that he should subscribe it in the presence of the other witness. *Logue v. Stanton*, 5 Sneed, 98; 1 Cold., 24; 8 Bax., 512; 9 Bax., 606; 2 Greenleaf on Evidence, Sec. 676; 1 Jarman (R. & T.), 212, 213; *Dewey v. Dewey*, 1 Metcalf, 349; *Jauncy v. Thorne*, 2 Barb. Ch., 40; *Burwell v. Corbin*, 10 Am. Dec., 494; *Ela v. Edwards*, 16 Gray, 92; 13 Gray, 110; *Ellis v. Smith*, 1 Vesey, Jr., 16; 2 Am. Dec., 624; 55 Am. R., 762; 4 Kent, \*516; *Rosser v. Franklin*, 6 Grattan, 1 (S. C., 52 Am. Dec., 97).

Cochran, the other subscribing witness, died before the trial, and, therefore, could not be examined in the presence of the Court; but his deposition, which had been taken in the Chancery cause, was used as evidence in this case.

He deposed that he was a neighbor of Margaret Simmons, deceased; that Dr. John M. Leonard called on him twice and told him she wanted him to witness her will; that a negro man, living on her place, was subsequently sent for him, and he then went to her house; that he found her alone, and when he first got there she told him she wanted him "to sign a will" for her, though she did not then produce it, or say more about it; that Dr. Leonard afterward came and "got the will out of the bureau, or off the top of it," and

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then at the request of witness signed the name of witness to it; that this request was made by witness because he was so nearly blind that he could not see well enough to sign his own name; that he, witness, did not have the will in his own hands, or see the testatrix have it in her hands at any time; that she did not sign it in his presence, and he did not know whether she signed it before he went to her house or after he left, if at all; that he did not have the will read or learn its contents.

His name, without more, is attached to the certificate. It is "Eleazar Cochran" simply, and not "Eleazar <sup>his</sup> + Cochran," as is usual when a person unable to <sup>mark</sup> write has another sign his name for him. There is no mark or sign to indicate that Cochran did not sign his own name, though the fact is, as he states himself, that it was written by Dr. Leonard at his request.

Clearly, Cochran was not a proper subscribing witness. He was competent in the sense of being disinterested, but the part he took in the execution of the alleged will did not give him the full character and functions essential to a subscribing witness. His evidence does not establish such a subscription as the law requires.

To constitute a valid will of real estate the instrument must be subscribed by two witnesses at least, neither of whom is interested in the devise. Code (M. & V.), § 3003; 5 Pickle, 588; 2 Hum., 202; 6 Lea, 543.



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The attempted subscription by Cochran is incomplete because his name, being signed by another person, is not accompanied by some mark or sign indicating his adoption of that other person's act. This Court has gone no further in liberal construction of the word *subscribe* than to hold that a person whose name is written by another, and *who makes his mark thereto*, is a good attesting witness to a will. *Ford v. Ford*, 7 Hum., 96, 97.

Though a mark so made is held to be a sufficient subscription, it is never advisable, where it can be avoided, to employ marksmen as witnesses. 1 Jarman on Wills, 213.

It seems to have been deemed sufficient not only because the name of the witness is written by his authority, but also because in making his mark he has a share in the writing, as when another person guides his hand and he makes his own signature. *Chase v. Kittridge*, 87 Am. Dec., 694; *Jesse v. Parker*, 52 *Ib.*, 102; *Montgomery v. Perkins*, *Ib.*, 419.

By statute the word "signature, or subscription, includes a mark, the name being written near the mark and witnessed." Code, §48.

There is even a greater objection, if possible, to Cochran as a subscribing witness. Though not interested in the devise himself, Dr. Leonard, who wrote his name for him, was the principal devisee under the will. This made the subscription utterly ineffectual. Cochran, though legally competent to become a subscribing witness, could not effectively

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perform the act of subscription through another person, who was legally incompetent to become such witness in his own name and right. To permit the devisee to write the name of the subscribing witness would expose the will to little less danger of wrongful alteration and substitution than would exist if the devisee himself were allowed to become the witness; the same evil consequences would follow in the one case as in the other. If he may sign the name of one subscribing witness, he may sign the name of both, and in that way become a more potent factor in the execution and probate of the will than if he were allowed to become a subscribing witness himself. He may not, lawfully, take the matter so largely into his own hands. A proper construction of the statute excludes the devisee from the doing of any act, even for the subscribing witness, which is essential to a valid subscription.

Again, though identification has always been the main reason for requiring subscribing witnesses in the execution of wills, Cochran was not asked to identify the paper propounded in this case as the one he claims to have witnessed for Margaret Simmons. Presumably, he could not have done so if asked. Indeed, he shows affirmatively that he could not. He made no inspection of the instrument to which he requested Dr. Leonard to sign his name; did not have sufficient eyesight to inspect it. Hence, he could not afterward recognize it by its physical appearance. No name, mark,

or sign did he impress upon it that subsequent recognition might be assured, or even rendered possible. Nor was he informed of its contents, so that he might thereby preserve its identity in his memory. Of course it was not essential that the witness should be informed of the provisions of the will. *Higdon's Will*, 6 J. J. Marshall, 444 (S. C., 22 Am. Dec., 84); 2 Barb. Ch., 40; 16 Gray, 92; 13 Gray, 110; 1 Jarman, 213. Yet, if the information had been imparted, it might have served him as one means of future identification.

It was necessary, however, that something should occur, and that he should do some act (and that according to law), which, if remembered, would thereafter enable him to swear to the identity of the paper. If no such thing occurred, and no such act was done, then there was no valid subscription.

We do not hold that the fact of due subscription can be shown alone by the subscribing witness. On the contrary, it is well settled that such fact may be established by other persons, though his recollection fail him, or he become openly hostile to the will. *Rose v. Allen*, 1 Cold., 23; *Jones v. Arterburn*, 11 Hum., 98; *Alexander v. Beadle*, 7 Cold., 128; 1 Metcalf, 349; 2 Barb. Ch., 40.

But the proof of other persons will not suffice, unless it, in truth, shows that all formalities requisite to a valid subscription were observed. There is no such proof of other persons in this case.

Cochran states the whole transaction, so far as he had part in it, without lapse of memory or unfriendliness to the cause of proponent; and no one discloses any additional fact occurring at the time he is said to have subscribed the will.

Whether the paper propounded is the same he attempted to subscribe or a different one cannot possibly be determined from the completest narration of all that was then said and done. Speaking alone from the part he took in the matter, Dr. Leonard says it is the same. He recognizes his own handwriting in the name of the witness, and in that way, by something he did himself, and not by any thing the witness did, is enabled to make the statement.

The necessity and use of his evidence for so important a purpose furnish a striking illustration of the correctness of our conclusion that Cochran's attempted subscription was inoperative in law, because his name was written by a devisee under the will.

Aside from the questions already discussed, it is by no means clear that the paper referred to by Cochran was ready for subscription when he was called upon to witness it. He does not know whether the testatrix had signed it or not. He did not see her signature, and no one told him it was on the paper.

Since it is the signature of the testator that subscribing witnesses are to attest, there can be no valid attestation or subscription unless it be a

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fact that the testator has actually signed his name, or caused it to be signed, before they subscribe their names. There is no will to witness until it has been signed by the testator. *Chase v. Kiltredge*, 11 Allen, 49 (S. C., 87 Am. Dec., 687). See also *Reed v. Watson*, 27 Ind., 448; 1 Jarman, 253, 254; *Shaw v. Neville*, 33 Eng. L. and Eq., 615; *Lewis v. Lewis*, 1 Kernan, 220; *Ragland v. Huntingdon*, 1 Iredell, 565; *John Cox's Will*, 1 Jones (N. C.), 324.

It is not essential that the testator sign his name in the presence of the subscribing witnesses, nor that they actually see his signature at all. *Ellis v. Smith*, 1 Vesey, Jr., 11; 1 Jarman on Wills (R. & T.), 212, 213; *Dewey v. Dewey*, 35 Am. Dec., 367; 16 Gray, 92; 13 Gray, 110.

The production of the will with his name signed to it, and in such a way that his signature may be seen by the witnesses, accompanied by a request of the testator that they witness it as his will, is a sufficient acknowledgment of the signature to render the will valid. *Ib.*; *Jauncy v. Thorne*, 45 Am. Dec., 432; 1 Jarman, 254.

In *Tilden v. Tilden*, 13 Gray, 110, the last of three subscribing witnesses neither saw the testator's signature nor heard him make any allusion to it. Yet, in that case, it was held that the words, "I wish you to witness this," constituted a sufficient acknowledgment, when considered in connection with the fact that the testator, who used the expression, at the same time presented to

the witness for attestation a paper which he had already signed as his will, and to which he had procured the names of two other witnesses, who did see his name before they signed their own names.

Giving the facts disclosed in this record the most favorable construction of which they are fairly susceptible, it may well be gravely doubted that the name of the alleged testatrix had been signed to the particular paper propounded at the time Cochran attempted to become a witness.

It is true she is shown to have said to the witness that she desired him "to sign a will" for her; but she did not say any thing about having already signed it herself, nor did she produce it then or afterward. After she made that request she seems to have done nothing, except acquiesce in the production of some paper from her bureau by another person, and its presentment by him to the witness for the latter's name—that other person being the principal beneficiary, and the supposed testatrix being old and illiterate.

Though allowed the same weight in this Court as the verdict of a jury (*Eller v. Richardson*, 5 Pickle, 576), the finding of the trial Judge, on the main question in this case, is without legal support. That the contested paper was duly executed as the will of Margaret Simmons is not established by sufficient competent proof. Ordinarily the testimony of one witness is entirely sufficient to sustain the finding of the Court or verdict of a jury

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upon an issue of fact; but that rule is not controlling in a case like this, where the law requires two witnesses to make out the matter in issue.

The statute requires two competent subscribing witnesses in every devise of land, and nothing less than that will justify a judgment in favor of the will. The law prescribes the *quantum* of proof requisite in such a case; and neither the jury, nor Court sitting as a jury, is allowed to find in favor of the will on less evidence than that prescribed.

There is no dispute as to the facts with reference to Cochran's attempted subscription. Whether under those facts he was a competent subscribing witness is a question of law. We think he clearly was not. Then, in legal contemplation, there was but one subscribing witness, and the judgment in favor of the will was necessarily erroneous.

Reverse and enter judgment here.

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Woodall v. Foster.

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## WOODALL v. FOSTER.

91	195
110	128

(Nashville. February 4, 1892.)

REAL ESTATE BROKERS. *Entitled to commissions, when.*

F., the owner of certain city lots, placed them in the hands of W., a real estate agent, to be sold on commission. W.'s right to make sale was not exclusive. F. sold the lots himself on the day he placed them in W.'s hands, but gave no notice of this fact to the agent. W., by reason of F.'s urgent needs, was induced to put forth "a vigorous and special effort" to effect a speedy sale, and accordingly found a satisfactory purchaser upon F.'s terms within three or four days after undertaking the sale, and without notice that F. had effected a prior sale.

*Held:* W. is entitled to the full commissions agreed upon for effecting a sale.

Cases cited: Cheatham v. Yarbrough, 90 Tenn., 77; Eller v. Richardson, 89 Tenn., 576.

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FROM DAVIDSON.

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Appeal in error from Circuit Court of Davidson County. W. K. McALISTER, J.

E. A. PRICE for Woodall.

W. D. COVINGTON, C. C. SLAUGHTER for Foster.



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CALDWELL, J. The plaintiffs are real estate agents, and as such they brought this action to recover the sum of \$94.50 claimed to be due them, as commissions, from the defendants. The Circuit Judge tried the case without a jury, and rendered judgment for defendants.

Plaintiffs have appealed in error.

On September 6, 1890, defendants employed plaintiffs to sell certain lots of ground, situated on Addison Avenue, in West Nashville, at \$14 per front foot. Being advised by defendants that they were in need of money and desired an early sale, plaintiffs promptly advertised the property, and put forth "a vigorous and special effort" to effect a speedy sale. Three or four days after their employment they procured a person who was ready, able, and willing to purchase the property at the price and on the terms directed by the defendants. On reporting this fact to the defendants, and requesting that all necessary papers be prepared and the sale completed, plaintiffs were informed, for the first time, that defendants themselves sold the property at \$12.50 per front foot on the same day they listed it with plaintiffs.

These facts, which are undisputed, make a clear case of liability on the part of defendants. Plaintiffs complied fully with their part of the contract. They did every thing they undertook to do, and performed every act devolved upon them by law; hence, they were entitled to compensation for their labor, the same as if the trade negotiated by them

had been ultimately consummated. Its consummation was defeated by no default on their part, but alone by the voluntary act of defendants.

It is true the defendants had the right to sell the property themselves, as they did, and that the sale, rightfully made by them, necessarily prevented the completion of the subsequent sale put on foot by plaintiffs; but it by no means follows that plaintiffs were thereby deprived of their right to compensation. When defendants sold the property it became their duty to notify plaintiffs of that fact, and until that was done the contract relation between them continued.

After defendants sold their property they remained silent as to the fact of sale at their peril, so far as the plaintiffs were concerned. It would be unjust to permit the agent to go on in the work of his principal until he has accomplished all he was employed to do, and then tell him, when the labor was done and expense incurred, that he should receive no compensation, because the principal, though without notice to him, had by other means attained the desired end.

In *Cheatham v. Yarbrough*, 6 Pickle, 77 (S. C., 15 S. W. R., 1076), this Court said: "The just and well-settled rule of law requires that the agent shall be paid his compensation when he procures a purchaser who is acceptable to the principal, and who is ready, able, and willing to buy on the agreed terms, though in fact the sale be not consummated; provided its consummation is prevented

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by the fault, refusal, or defective title of the principal."

The doctrine of that case, which is sustained by the authorities, controls this one. In that case, as in this one, the agent did all that was incumbent upon him to do, and the sale was defeated without any fault on his part. There it failed on account of a defect in the principal's title, of which the agent had no knowledge; here it failed because the principal voluntarily conveyed his title to another person, pending the agency and without any notice to the agent.

Of the two cases, if there is any material difference between them, this is the stronger one for the agent; for in this case the principal divested himself of a good title after employing the agent, while in that one the principal was simply unfortunate in not having such title as the proposed purchaser would accept or could be required to take.

Plaintiffs contended below and insisted here that defendants gave them the *exclusive right*, for the period of eight days, to sell the lots. Defendants disputed that proposition, and evidence *pro* and *con* was introduced. The trial Judge found that no exclusive right of sale, for any length of time, was given to plaintiffs. That finding, upon a disputed question of fact, is conclusive in this Court, being of the same weight as the verdict of a jury, and having material evidence to support it. *Eller v. Richardson*, 5 Pickle, 576.

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Taking the facts to be as found by the trial Judge, we are of opinion that he erroneously applied the law.

Reverse, and enter judgment here for the plaintiffs.

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Stone Company v. Board of Publication.

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STONE COMPANY v. BOARD OF PUBLICATION.

(Nashville. February 9, 1892.)

MECHANICS' LIEN. *Furnisher of materials to subcontractor not entitled to.*

The furnisher of building materials to a subcontractor has not, under our statutes, a mechanics' or furnisher's lien upon the property constructed, built, or repaired therewith.

Code construed: §§ 2739, 2746 (M. & V.); §§ 1981, 1986 (T. & S.).

Cases cited: *Stevens v. Wells*, 4 Sneed, 389; *Greenwood v. Tennessee Manufacturing Company*, 2 Swan, 130; *Iron Company v. Bynum*, 3 Sneed, 269; 17 Wend., 550; 23 *Id.*, 395; 29 Ohio St., 227; 27 Penn., 511.

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FROM DAVIDSON.

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Appeal from Chancery Court of Davidson County. ANDREW ALLISON, Ch.

FRIZZELL, ZARECOR & COLES for Stone Company.

JOHN M. GAUT, HAMILTON PARKS, and DICKINSON & FRAZER for Board of Publication.

LURTON, J. The point for decision is as to whether one who furnishes materials to a subcontractor is within the provisions of Code, § 2739

*et seq.*, giving a lien to contractors, mechanics, and furnishers of materials.

Section 2739 gives a lien "upon any lot of ground or tract of land upon which a house has been constructed, built, or repaired, \* \* \* by special contract with the owner or his agent, in favor of the mechanic or undertaker, founder or machinist, who does the work or any part of the work, or furnishes the materials or any part of the materials," etc.

This section is substantially the first section of the Act of 1846, Ch. 118.

By §2746 this lien is extended to "every journeyman or other person employed by such mechanic, founder, or machinist to work on the buildings, fixtures, machinery, or improvements, or to furnish materials for the same."

This section is in substance the second section of the Act of 1846.

By a careful reading of these sections it will be seen that the one first quoted gives the lien only to the mechanic or undertaker, founder or machinist, who by *special contract with the owner* of the lot does the work or furnishes materials. If the law had stopped here, none but original contractors would be entitled to the lien. But by the next section quoted the benefits of this lien are extended to all persons who shall be employed by "*such mechanic, founder, or machinist* to work on the buildings, \* \* \* or to furnish materials for the same." Thus *subcontractors*, upon complying

with the other provisions of the law, were brought within the meaning of the Act. Complainant is not a contractor who has furnished materials, and it is therefore not within § 2739. Neither has it been employed to furnish materials by a contractor. Therefore it is not entitled to stand upon the section relating to subcontractors. It is, however, claimed that the Act of 1860, Ch. 114, so extends this lien as to embrace the case of a contractor in the third degree. This Act reads as follows: "That § 1981 of the Code (being § 2739 of compilation of Milliken & Vertrees) be so amended that the benefits of said section shall apply to all persons doing any portion of the work, or furnishing any portion of the material for building contemplated in said section."

To understand the intent of the Legislature by this amendment, we must look to the history of this mechanics' lien law. It is only necessary to go back to the Act of 1846. This Act, by its first section, gave the lien to "*any mechanic or undertaker by special contract with the owner.*" By the second section of this Act this lien was extended to the "*journeyman workmen of said mechanic or undertaker, or such other person or persons as may be employed by him or under him to do any part of the work or furnish any of the said material.*" This Act had been construed as giving the lien by the first section *only* to one who was a "*mechanic or undertaker*" of the contract. The second section applied only to such

persons as were employed by "*such mechanic or undertaker*" to do work or furnish material. It was therefore held that, as the owner was neither a mechanic nor undertaker, one who sold him lumber, to be used in his house, had no lien. *Stevens v. Wells*, 4 Sneed, 389. It did not extend to a merchant who sold the owner machinery to put up in a flouring-mill. *Greenwood v. Tennessee Manufacturing Company*, 2 Swan, 130. Neither did it extend to a manufacturer who furnished and put up machinery in a steam tannery. *East Tennessee Iron Manufacturing Company v. Bynum*, 3 Sneed, 267.

The Act was widened, as carried into the Code of 1858, so as to add to the "mechanic or undertaker" the "founder or machinist." This amendment met the difficulty pointed out by the cases of *Greenwood* and *Bynum*, but did not cover the trouble pointed out by *Stevens v. Wells*, 4 Sneed, where it was held that one who furnished materials to the owner of the house, and upon contract with him, had no lien, because, said Judge Harris, such persons "are neither mechanics who have worked on the house, nor are they undertakers for its construction, nor have they furnished materials to the mechanic or undertaker."

The Act of 1860 amends § 2739 in such manner as to meet the last of the series of decisions mentioned. But this amendment in no way affects § 2746. The amended section relates alone to a limited class of persons who have *special contracts*



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Stone Company v. Board of Publication.

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*with the owner.* Section 2746 relates to a class of persons who, *without any contract with the owner*, may acquire a lien. The section amended gave the lien only where the materials were furnished by a mechanic or undertaker or founder or machinist *having a special contract with the owner.* By the amendment the lien is extended to "all persons" who have a special contract with the owner, who do any part of the work or furnish any part of the materials. The thing essential to the lien given by the amendment is that the person claiming it shall have a *special contract with the owner* for the work or material. If it had been intended to extend the lien to a contractor in the third or fourth degree removed from the owner, or to any creditor of a remote subcontractor, then § 2746, which relates alone to persons having no contract with the owner, should have been amended. To justify a construction which would extend this lien to remote contractors or creditors of subcontractors, the statute should be so plain as to admit of no doubt. Such a construction would operate with great severity upon both the owner and contractor. Upon the contractor, in the present state of the law, such a lien would be most oppressive. His own contract might be a prudent one. His contracts with subcontractors might be such as to leave him a margin of profit. But if the contract price to be paid by the owner is to be subjected to the improvident agreements of the subcontractors, over whose contracts he has no control,

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he is left without protection, unless he requires such bond as most small contractors would be unable to give. The strong tendency of judicial opinion has been against any construction extending these liens to the creditors of subcontractors. *Wood v. Donaldson*, 17 Wend., 550, and 23 Wend., 395; *Stephens v. United Railroad*, 29 Ohio St., 227; *Harris v. Rand*, 27 Penn., 511.

Decree affirmed.

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Roach v. Woodall.

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## ROACH v. WOODALL.

(Nashville. February 11, 1892.)

1. NEGOTIABLE INSTRUMENTS. *Holder as collateral an innocent holder.*

The *bona fide* holder of a negotiable note transferred to him before its maturity, as collateral security, upon a valid and sufficient consideration accruing at the time of its transfer, will be protected as an innocent holder for value in due course of trade.

Case cited and approved: *Nichol v. Bate*, 10 Yer., 429.

Cited and distinguished: *Craighead v. Wells*, 8 Bax., 38.

2. SAME. *Holder by wrongful transfer not protected.*

The holder of a negotiable note cannot retain it against the payee, though otherwise entitled to protection as an innocent holder, where he took the note, being payable to order, from a person other than the payee or an indorsee; the payee never having in fact indorsed the note or authorized its transfer, although his indorsement was forged thereon.

Case cited and overruled: *Duke v. Hall*, 9 Bax., 282.

3. SAME. *Infant's indorsement.*

It is strongly intimated, though not authoritatively decided, that an infant's indorsement of a negotiable note is void in every case. But if not void, it is clearly voidable, the indorsee being chargeable with notice of the indorser's infancy.

Case cited and approved: *McMinn v. Richmond*, 6 Yer., 9.

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FROM DAVIDSON.

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Appeal from the Chancery Court of Davidson  
County. ANDREW ALLISON, Ch.

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Roach v. Woodall.

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MATT. W. ALLEN and STOKES & STOKES for Roach.

CHAMPION, HEAD & BROWN for Woodall.

SNODGRASS, J. Isaac Whitworth sold to J. B. and William Hartman a tract of land, taking in part consideration therefor the following note, payable to his minor son:

"JANUARY 21, 1878.

"Thirteen years after date we promise to pay to the order of Milton J. Whitworth five hundred dollars, being fourth payment for a tract of land. Value received.

"JOHN B. HARTMAN,

"WILLIAM HARTMAN."

The note subsequently came into the possession of Defendant Woodall, as guardian of the minor payee.

Woodall delivered the note to Defendant W. I. Cherry in 1889, and before it was due, as collateral security for Cherry's indorsement of Woodall's note in bank for \$500, which last note Defendant Cherry subsequently paid as indorser.

At the time the note in controversy was delivered it had indorsed upon it the name of Milton J. Whitworth, the payee. Cherry did not know Whitworth, or that he was a minor at the time, nor that Woodall was his guardian. Woodall did not transfer as guardian, or pretend to do so.

He claimed to be a purchaser of the note from Whitworth, and to own the note, and under this claim delivered it, thus indorsed, to Cherry.

The indorsement was a forgery; and after the death of Milton J. Whitworth, who died before he became of age, S. H. Roach administered upon his estate, and filed this bill to recover of Defendant Cherry the note, and to collect it of the Defendants Hartman.

Cherry defended upon the ground that he was an innocent purchaser for valuable consideration, and without notice. The Chancellor decreed in favor of complainant, and Cherry appealed.

Assuming that Cherry took the note as consideration for his indorsement of Woodall's note at the time or before the delivery of the Whitworth note to him, he would be a holder for value and in due course of trade. *Nichol & Hill v. Bate*, 10 Yer., 420.

A different result would follow if received after he had incurred the liability, and took it merely as security for a pre-existing debt. *Craighead v. Wells*, 8 Bax., 38.

The complainant insists that the testimony of Mr. Cherry is not sufficiently specific to show that he in fact received the note in consideration of the indorsement; but that all he says may be taken as true, and yet it may have been delivered to him to secure him after he had incurred this liability.

Waiving this question, and for the purposes of

this opinion treating his evidence as affirmative—that the indorsement was made upon this consideration—we consider the effect of the delivery to Cherry of this note with the forged indorsement of the payee, leaving for the time out of view the fact that the supposed indorser was a minor. Does such a holder obtain title to the note, and can he defeat the true owner, the payee, or his representative, who seeks to recover it from him? It is assumed in argument of defendant's counsel that this proposition was decided in the affirmative by our predecessors in this Court in 1878. *Duke v. Hall*, 9 Bax., 282.

As stated in the opinion of the Court in that case, the note in controversy was one made by A. D. Hurt payable to Allen Deberry, and by him "indorsed to J. W. Glass." This note, without indorsement by J. W. Glass, was placed by him in the safe of J. E. Glass. The latter, without authority, indorsed the name of J. W. Glass upon it and transferred it to an innocent purchaser or holder for value. This holder transferred to another. The suit was by the assignee of J. W. Glass, the real owner, against the last purchaser, and it was held that he was not entitled to recover. The statement in the opinion is that the note was "indorsed by the payee to J. W. Glass." Whether it is meant that this indorsement was in terms to him or whether it was indorsed in blank and delivered to him, is not clear, but treating the language quoted as showing that it was not

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indorsed in blank, but to J. W. Glass by name, it put the title in him, and required his indorsement to pass it out of him, and this is elsewhere assumed in the opinion. Still it is not the exact case presented here, because there the note was first properly indorsed by the payee to another, while here there never was any indorsement put upon it by the payee. But regarding that indorsement as to J. W. Glass by name, as it purports fairly to have been in the language of the opinion, there is no difference in principle in that case and this, because there as here it was payable to a particular person or his order—in that case by indorsement, in this on its face; and if that case is correctly decided, it is conclusive of this. In that case Judge Freeman, delivering the opinion, quoted from Kent the principle assumed to authorize it, as follows:

“The *bona fide* holder can recover on the paper, and gets a good title to it, though it come to him from a party who had stolen or robbed it from the true owner, provided he took it innocently in the due course of trade for a valuable consideration not overdue, and under circumstances of due caution, and he need not account for his possession unless suspicion is raised.” 3 Kent, 78, 79.

The quotation was a very clear and accurate statement of the law as recognized generally by text-writers and Courts where it applies; but it was not made by the author in reference to paper

stolen from the payee before indorsement by him, or to paper which required indorsement to be made before title could be passed, and which was subsequently forged, but related to negotiable paper payable to bearer, or indorsed in blank before stolen, and thus made payable to bearer, in which case the thief had nothing to do but deliver the paper, with or without further indorsement, to a *bona fide* purchaser, as the preceding part of the paragraph (not quoted by Judge Freeman) clearly shows. That part was as follows:

“Possession is *prima facie* evidence of property in negotiable paper payable to bearer or indorsed in blank; and the bearer, though a mere agent, or the original payee, when the indorsement is in blank, may sue on it in his own name without showing title, unless circumstances appear creating suspicion.”

When Mr. Kent adds, “the *bona fide* holder can recover upon *the* paper,” the reference is to *such* paper—that is, to paper transferable by delivery, payable to bearer, or having upon it a valid indorsement in blank when stolen—and it is only to such paper that the rule applies under all the authorities. The distinction is very clear between the transfer of such paper and the attempt to transfer paper stolen or obtained without authority, not payable to bearer or indorsed in blank when stolen or so obtained. In the latter case no title can be passed to an indorsee or transferred by reason of a forged indorsement, as against the party whose indorsement is forged. Daniel on



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Roach & Woodall.

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Neg. Insts., Secs. 677, 1354, 1469; Parsons on Notes and Bills, Vol II., p. 284; Story on Prom. Notes, Secs. 381, 382, 383.

Authorities on this point need not be multiplied in citation—there are none to the contrary. The distinction was overlooked in the case of *Duke v. Hall*, 9 Baxter, and the holding on this point in that case was not the law, and to that extent it is overruled.

Another question decided by the Chancellor was that the indorsement might be avoided by complainant and the note recovered because of the minority of the payee—the supposed indorser.

Under the decisions in this State and others the indorsement might well have been held to be void.

Mr. Story, in his work on Promissory Notes, Secs. 77–80, puts upon the same ground the minor's incapacity to indorse and make a promissory note, and shows that there is a conflict of opinion as to whether such act is void or voidable.

The Court of this State has ranged itself with those holding the making of a negotiable note by a minor, even for necessities, a *void* act, and this, after full discussion, upon the weight of authority. *McMinn v. Richmond*, 6 Yer., 9.

Mr. Story thought the weight of authority preponderated in favor of holding promissory notes given or indorsed by an infant voidable only. Sec. 78. But, treating it from this stand-point, he declares the law to be well settled that not only may the infant avoid it and intercept payment to

the indorsee, but by giving notice to the antecedent parties of his avoidance, furnish to them a valid defense against the claim of the indorsee. Sec. 80.

It would seem clear, then, that whether such indorsement were void or voidable, the minor or his representative might avoid it and recover the note of the transferee, and that this is not only a well-settled but a just rule of law; for a transferee who receives by delivery merely from bearer a note with the name of another indorsed upon it, ought to be charged with notice who that indorser was, and whether a person who could in law bind himself by an indorsement. If he does not in fact know the indorser, he would hardly predicate any thing of an indorsement, or rely on it without inquiry. Such inquiry would disclose the minority of the indorser, and, consequently, it might well be holden that the transferee was chargeable with notice of the invalidity of the indorsement.

But as the minor did not in fact indorse the note in controversy, these questions do not necessarily arise or call for decision, and we therefore rest the decision upon the ground already stated—the invalidity of the transferee's title under the forged indorsement.

The decree is affirmed with cost.

## CATHOLIC KNIGHTS v. KUHN.

(Nashville. February 13, 1892.)

1. LIFE INSURANCE. *Constitution and by-laws of mutual benefit associations constitute part of contract.*

The constitution and by-laws of a mutual benefit association are, by implication, imported into and become part of the contract of insurance made by it upon the life of a member.

Case cited and approved: Tennessee Lodge v. Ladd, 5 Lea, 720.

2. SAME. *Construction of mutual benefit certificates.*

In 1882 H., being a member of a mutual benefit association, procured the issuance of a benefit certificate upon his life for \$2,000. This certificate was made payable to his brother. In 1887 H. voluntarily, but without his brother's consent, surrendered this certificate and obtained another for a like sum payable to himself. This latter certificate he bequeathed to K. At date of issuance of the first certificate the "laws of the order" prescribed that a certificate could be surrendered and changed only "with the consent of the beneficiary indorsed." Another provision of these laws was that any law of the order might "be amended at any regular meeting of the supreme council." After issuance of the first certificate to H., and before the issuance of the second, the laws were amended so as to authorize change and substitution of certificates without consent of the beneficiary.

*Held:* That K., the legatee under H.'s will, was entitled to the \$2,000 fund. The brother's interest was defeasible, and was defeated by substitution of the new certificate after the change in the laws of the order.

Cases cited and approved: 8 S. W. R., 38; 28 Minn., 449; 63 N. H., 535; 3 S. W. R., 427.

3. SAME. *Bequest of benefit certificate valid.*

And the assured may dispose, by will, of such benefit certificate where it is, upon its face, made payable to himself.

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Cases cited and approved: *Rison v. Wilkerson*, 3 Sneed, 565; *Tennessee Lodge v. Ladd*, 5 Lea, 721; *Williams v. Carson*, 2 Tenn. Ch., 269; *Weil v. Trafford*, 3 Tenn. Ch., 108.

4. SAME. *Same*.

And no question can be made in such case as to the legatee's insurable interest in the deceased.

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FROM DAVIDSON.

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Appeal from Chancery Court of Davidson County.  
ANDREW ALLISON, Ch.

FRANK JOHNSON and E. L. GREGORY for Complainants.

J. W. BONNER and BRYAN & CARTWRIGHT for Defendants.

CALDWELL, J. This is a bill of interpleader, filed by the Catholic Knights of America, a mutual benefit association, against C. B. Kuhn and William Huppert, to have the Court determine which of the two defendants is entitled to the proceeds of a \$2,000 benefit certificate, issued by complainant to Peter Huppert, deceased, upon his life.

At different times, during his membership in the association, Peter Huppert held two of its benefit certificates; one issued April 18, 1882, the other

June 28, 1887. The first one was payable, on its face, to defendant, William Huppert, a brother of the assured; but, after running about five years, it was voluntarily surrendered by Peter Huppert, and, at his instance, the second one was issued in its stead, payable to the assured himself as beneficiary. This second certificate the assured bequeathed to the other defendant, C. B. Kuhn, charged with certain debts and trusts mentioned in his will.

After the death of Peter Huppert each of the defendants claimed the \$2,000. Thereupon this bill was filed, and the defendants became the active and adverse parties in the litigation.

William Huppert, in his answer, averred that he took a vested interest in the first certificate, of which he could be deprived only by his consent, and that the attempted change in the beneficiary was illegal and void, because made without his consent.

Kuhn, answering, insisted that the change was authorized by the law of the order, that it was regularly made, and that he was entitled, under the will, to receive the fund. The Chancellor's decree was in favor of Kuhn, and Huppert appealed.

The constitution and by-laws of the order, so far as applicable, entered into and formed part of the contract with Peter Huppert; those laws, in connection with the words of the certificate, constituted the contract of insurance in its proper and legal sense. Bacon on Benefit Societies and Life Insurance, Secs. 161, 184, 185.

Though not stated in so many words, this rule of construction was recognized and applied by this Court in *Tennessee Lodge v. Ladd*, 5 Lea, 720, 721.

The language of the first certificate, with reference to the member's right to change beneficiaries, is as follows:

"Said Peter Huppert shall have the right, during his membership in the order, to surrender this certificate and receive a new one; and may substitute another beneficiary or beneficiaries therein, if he so desires, by complying with the laws of the order upon this subject."

"The laws of the order" then existing, prescribed the mode of substitution, and authorized it to be made *only* "with the consent of the beneficiary indorsed" on the certificate surrendered.

In this case it turns out, as a matter of fact, that William Huppert, the beneficiary in the first certificate, not only did not consent to the change in the manner prescribed, but he had no notice whatever that a change was contemplated, and never in any way assented to the issuance of the second certificate.

Therefore it would seem, nothing else appearing, that he was not bound by the change, and that the second certificate was illegal and void, because issued without the requisite authority. But there was another law of the order which likewise formed an important part of the contract, and that was that *any* of its laws might "be amended at any regular meeting of the supreme council."

That provision, as well as the one allowing a change only "with the consent of the beneficiary," is to be considered in connection with the words of the certificate; it, too, was a part of the contract in which William Huppert was named as beneficiary. From this it follows, necessarily, that he, as beneficiary, had no fixed and unalterable rights, and none that he could make so by simply failing or refusing to consent to the substitution of another beneficiary in his stead. All his rights were subject to the order's reserved power of amendment. The contract, as gathered from the terms of the certificate and the laws of the order applicable thereto, was (1) that, in case Peter Huppert, the assured, should die before changing the beneficiary, William Huppert should receive the \$2,000; (2) that a change of beneficiary, as the law then existed, could be legally effected only by and with the consent of William Huppert indorsed on the certificate, and (3) that the existing requisites to a valid change of beneficiary were subject to amendment by action of the supreme council of the order issuing the certificate.

Subsequently, in May, 1885, the supreme council, in exercise of that reserved right, *did* amend the law relating to the substitution of one certificate for another one, so as to authorize a change of beneficiary *without* the consent of the beneficiary named in the certificate surrendered. Two years after that amendment, and in strict conformity to the requirements of the law as amended, the

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first certificate taken out by Peter Huppert was surrendered and the second one issued in its room and stead. Thus the first certificate ceased to have any legal existence, and the second one came into full force and virtue. By the substitution the conditional or contingent right of William Huppert, as beneficiary, was entirely extinguished, and the order became bound according to the terms of the second certificate, which was outstanding and in the hands of the assured at the time of his death. This conclusion is inevitable, when it is considered that the laws of the order are, by implication, imported into and made part of the contract.

*Byrnes v. Casey*, 8 S. W. R., 38, is a case precisely in point. There, as here, the question was upon a substituted certificate, issued by the Catholic Knights of America, the change having been made without the consent of the beneficiary named in the first certificate, but after an amendment dispensing with the necessity of such consent. The substitution was held to be legal, and to deprive the first named beneficiary of all right of participation in the fund. See also, to substantially the same effect, *Richmond v. Johnson*, 28 Minn., 449; *Barton v. Association*, 63 N. H., 535; *Bacon*, Secs. 305-307; *Schillinger v. Boes*, 3 S. W. R., 427.

The second certificate before us, being payable on its face to Peter Huppert, the assured, was a part of his property, and as such subject to dis-



position by will. *Rison v. Wilkerson*, 3 Sneed, 565; *Williams v. Carson*, 2 Tenn. Ch., 269; *Weil v. Trafford*, 3 Tenn. Ch., 108; *Tennessee Lodge v. Ladd*, 5 Lea, 721.

Having been bequeathed to Defendant Kuhn, he became the lawful owner of it, and is entitled to receive its proceeds, subject to the debts and trusts mentioned in the will.

Appellant's contention that Kuhn can, at most, take only a sufficiency of the fund to pay debts due him, on the ground that such sum was the measure of his insurable interest in the deceased, is not well made. The rule of law invoked has no place in a case like this. Kuhn takes the fund, not because of *any* insurable interest in the life of Peter Huppert, but alone as legatee or beneficiary under his will.

Affirm.

## SMITH v. RAILROAD.

(Nashville. February 23, 1892.)

1. CORPORATION BONDS. *Innocent purchase from trustee.*

The purchase of negotiable corporation bonds from the ostensible owner, though he be in fact only a trustee and his sale in breach of trust, confers perfect title upon the buyer even against the *cestui que trust*, if the purchase was in good faith, for full value, and without knowledge or notice, actual or constructive, of the existence of the trust. (*Post*, pp. 224-228.)

2. SAME. *Same. Innocent agents protected.*

And persons innocently aiding in such purchase incur no liability to the *cestui que trust*. (*Post*, pp. 224-228.)

3. CORPORATIONS. *Re-issue of stock certificates to assignee. Negligence.*

Stock certificate assigned to "heirs and distributees" of original stockholder by his "administrator" was presented by a distributee, to whom a new certificate was issued individually and for his own benefit. The corporation was ignorant that the original stockholder had died testate, limiting by his will the interest of this distributee, who was also a legatee, to a life estate in personalty, and creating a trust in remainder.

*Held*: Corporation not guilty of negligence in making this re-issue. It was not put upon inquiry as to will and its trusts. (*Post*, pp. 229, 230.)

Cases cited and distinguished: *Covington v. Anderson*, 16 Lea, 310; *Caulkins v. Gas Company*, 85 Tenn., 683.

4. SAME. *Same. Same.*

Bequest of "one-fifth in value" of testator's personal estate to a legatee for his own life, and to be preserved in remainder and held in trust for another. The administrator *cum testamento annexo* delivered stock certificates to this legatee in payment of this legacy, assigning them absolutely to the "heirs and distributees" of the testator, and the

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corporation, without notice of the will, issued new certificate in like terms to this assignee and legatee.

*Held:* The administrator, *cum testamento annexo* was not guilty of breach of trust in making absolute assignment of the stock certificates in payment of such legacy, and, *a fortiori*, the corporation was not guilty of negligence in issuing new certificates according to terms of assignment. (*Post*, pp. 224, 229, 230.)

5. SAME. Same. Same.

But, assuming negligence of the corporation in such case, by reason of its failure to ear-mark the new stock certificates with the trusts imposed by the will, still that negligence is not proximate cause of loss where the stock certificates did, nevertheless, go into the hands of the proper trustee and were subsequently lost by reason of his independent acts of negligence. (*Post*, p. 231.)

6. SAME. Same. Same.

Upon transfer of the original stock certificate by the person to whom it was issued, and in whose name it stood upon the company's books, the corporation issued a new certificate to the assignee. The original stockholder held the certificate as a trustee, and made the assignment in breach of his trust, and misapplied the proceeds realized from the sale of this stock. The corporation had no knowledge of the trust.

*Held:* Corporation not liable to *cestui que trust* for their loss. It was guilty of no negligence. (*Post*, pp. 232-234.)

Cases cited: 97 U. S., 369; 127 U. S., 614; 96 U. S., 193; 7 N. Y., 274; 125 Mass., 138; 42 Md., 384; 44 Md., 551.

7. SAME. Same. Same.

Although the corporation had full knowledge of the breach of trust on the part of the original stockholder in making the transfer of the certificate, still the corporation cannot incur any liability to the *cestui que trust* for issuing the new certificate, if the assignee was entitled to be protected as an innocent holder of the original certificate. He could compel the corporation to recognize him as a stockholder in such case. (*Post*, pp. 235-239.)

8. SAME. Assignment of stock confers title without registration upon company's books.

And assignee's title to shares of stock is complete, and, being otherwise an innocent purchaser, he is entitled to protection, and to enforce his

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rights as such without and before registration of his transfer upon the books of the company. (*Post*, p. 238.)

Cases cited and approved: *Cherry v. Frost*, 7 Lea, 1; *Caulkins v. Gas Company*, 85 Tenn., 684; *Hadley v. Kendrick*, 10 Lea, 525; *Bank v. Farrington*, 13 Lea, 333; *Bank v. Planing Mill Co.*, 86 Tenn., 252; 11 Wall., 377.

Cited as disapproved: *Cornick v. Richards*, 3 Lea, 1.

9. SAME. *Assignment of stock by infant voidable but not void.*

Infant's assignment of shares of stock is only voidable and not void.

Therefore, the corporation is not only protected in acting upon such assignment until it is avoided by the infant, but may be compelled to recognize it. (*Post*, pp. 239, 240.)

Cases cited and approved: *Wheaton v. East*, 5 Yer., 61; *McGan v. Marshall*, 7 Hum., 125; *Barker v. Wilson*, 4 Heis., 269.

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FROM DAVIDSON.

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Appeal from the Chancery Court of Davidson County. ANDREW ALLISON, Ch.

N. N. COX, JONES & HOUSTON, A. D. MARKS,  
and PITTS & MEEKS for Smith.

G. N. & A. M. TILLMAN, DEMOSS & MALONE,  
and COOK & MARSHALL for Railroad.

LURTON, J. Under the will of Jos. W. Baugh, certain real estate and the "one-fifth part in value" of his personal estate, was bequeathed to

the complainant, his daughter, then Fannie F. Baugh, subject to the following limitations:

“To have and to hold the same, together with the increase, rents, and profits thereof, to her sole and separate use and benefit, and free from the debts, contracts, liabilities, and control of any husband whom she may marry, and for and during the term of her natural life; and at her death the said property, real and personal, together with the increase, rents, and profits thereof not consumed in her support and maintenance, and the support and maintenance and education of her children, to be equally divided between the children of the said Fanny, the child or children of any deceased child to take the share its parent would have taken if living. But should the said Fanny depart this life leaving no child or children, or the issue of such, then, in that event, the property herein bequeathed to her, and its increase, etc., shall be equally divided between her brothers and sisters surviving her, and the issue of such as may be dead leaving issue. And should it become necessary, in giving full force to this item of my will, I desire that suitable trustees be appointed, it being distinctly my will and desire to give to my said daughter a life estate merely, with remainder over as hereinbefore mentioned.”

Testator owned, at his death in 1872, fifty-seven bonds of five hundred dollars each, issued by the defendant railway company. He also owned one thousand two hundred and fifty shares of the com-

mon stock of the same corporation, for which he held stock certificates, registered on the books of the company in his own name.

No executor being named in the will, Mr. S. S. House was appointed and qualified as administrator with the will annexed. These bonds and stock certificates came to the hands of Mr. House as assets to be administered. There being no occasion to use them in payment of debts, and no specific bequest having been made of either bonds or stock, the administrator distributed them among the legatees—the shares of stock by an assignment of the certificates to the “heirs and distributees of J. W. Baugh, deceased.” No particular number of shares were directed to be assigned to the several distributees, nor were the persons designated who were “heirs and distributees;” but Mr. J. W. Baugh, a son and distributee, was, in the usual form, constituted his attorney in fact to make and execute all necessary acts of assignment and transfer to carry out the purpose. Under this power and assignment, the company transferred two hundred and fifty-one shares to Fanny F. Baugh, the complainant, who was then a minor and unmarried. This certificate was, in form, an assignment and transfer out and out of the whole title to these shares, it nowhere being recited in the certificate that her interest was but a life estate.

Shortly after this transfer, Mrs. C. H. Baugh, widow of the testator and mother of Fanny, was

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appointed by the County Court trustee for her daughters Fanny and Cicily, to the latter of whom a similar bequest had been made, subject to same limitations. She qualified by giving bond in the sum of seventy thousand dollars, and received into her possession the bonds and stock certificates which had been assigned to her *cestui que trust* by the administrator.

In May, 1877, complainant, Fanny, was married to the defendant, B. B. Smith, and in December, 1877, Mrs. Baugh's resignation as trustee for Mrs. Smith was accepted, and Mr. Smith appointed in her room and place, he entering into bond in the sum of fifteen thousand dollars, with three sureties. Thereupon the bonds and stock held for Mrs. Smith were turned over to her husband as her trustee.

In February, 1879, B. B. Smith and wife jointly assigned the certificate standing in her name, by filling out the blank assignment to G. M. Rizon, and constituted him their attorney in fact to assign same on transfer books of the corporation.

May 17, 1879, this assignment to Rizon was duly acknowledged before a Clerk of a County Court, Mrs. Smith being privily examined.

On the same day this certificate was sold and assigned to Clark, Dodge & Co., Rizon executing an assignment on the original certificate. This sale was made by, and the money paid to, Mr. Smith.

Afterward Clark, Dodge & Co. assigned the

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same certificate to Victor Newcomb, and on December 15, 1879, it was sent to the secretary of the defendant corporation, and the shares transferred from the name of Fanny Baugh to that of the purchaser, a new certificate being issued.

The railroad bonds held by Smith were, about the time of the sale of the stock, sold to the defendant, Samuel Seay. The bonds and shares were sold for their full market value at the time. The proceeds were by the trustee misapplied, and, as charged by the bill and admitted in his deposition, "squandered in drinking, gambling, and other dissipations."

As to the bonds, the bill charges that the purchaser knew that the seller, Mr. Smith, held them as a trustee, and was therefore bound to inquire as to his power to make sale; that, in fact, they were bought for the company issuing them, or for Mr. G. W. Seay, its secretary and treasurer, who, it is charged, knew, or ought to have known, of the trust under which they were held.

A decree is sought against all the persons suggested as interested in the purchase or aiding in making the sale. The Chancellor dismissed the bill so far as any relief was sought on account of the sale of these bonds. In this part of his decree we most fully concur. The evidence that they were purchased by Mr. Samuel Seay in good faith, and in absolute ignorance that Mr. Smith held them in trust, is entirely satisfactory. We are also satisfied that neither G. W. Seay nor the



railroad company were in any way concerned in their purchase or sale. It is simply a case of negotiable securities, in no way ear-marked, sold on open market by a trustee entitled to their possession to innocent purchasers for full value, who neither had knowledge of the fact that the seller was a trustee or of any purposed breach of a trust.

Are complainants entitled to any relief against any of the defendants on account of either the sale or transfer of the stock certificate? The assignment to Rizon seems to have been a sham, and intended to aid in the proposed sale of the shares. Rizon was Smith's brother-in-law. He was present at the sale to one McCrory, and himself executed an assignment to Clark, Dodge & Co., for whom, it would seem, McCrory was acting. Rizon at once received a part of the proceeds. He is not sued; neither are the sureties on Smith's bond as trustee. The bill undertakes to excuse this by alleging the sureties to be insolvent. They are the father and brothers of the defaulting trustee, and this is more probably the reason for omitting them. Clark, Dodge & Co. are not sued. Victor Newcomb, in whose name the shares now appear to stand, was named as a non-resident defendant in the caption of the bill. No publication seems to have been made, and no attachment was sought against the shares which, from this record, seem to still stand in his name. Mr. Newcomb did not answer, and, not being

before the Court, his attitude as a purchaser becomes unimportant, except so far as it shall affect the liability of the corporation for transferring this stock to him. The Chancellor was of opinion that the railway company was guilty of negligence in making or allowing this transfer, and decreed accordingly. From this part of the decree it has appealed.

Complainants have sought to support this decree upon several independent grounds.

*First.*—That the act of the corporation was negligent in issuing a certificate, in 1873, to Fanny Baugh without showing on its face the trusts and limitations under which she held the title, and that this neglect led to the subsequent loss of the stock to an innocent purchaser without notice.

We are of opinion that, upon the facts of this case, the corporation is not now liable to an action on this ground. It had no knowledge that there was a will limiting the title of Fanny Baugh to this stock, and there were no circumstances connected with the transfer by Mr. House, as administrator, calculated to put it upon inquiry as to the existence or terms of a will. He assigned the certificate standing in the name of his decedent simply as administrator. If he had assigned as administrator *cum testamento annexo*, it would have been notice of a will; but such a signature would have been singular, though technically exact. The assignment was to the "*heirs and distributees*," not *legatees*, of J. W. Baugh. There was, there-

fore, nothing about the transfer calculated to indicate a will. In this respect the case is to be distinguished from *Covington v. Anderson*, 16 Lea, 310, and *Caulkins v. Gas Company*, 85 Tenn., 688. The fact that stock is assigned by one other than the person to whom it was issued devolves upon a corporation, when called upon to transfer the shares and issue a new certificate, the duty of inquiry as to the power of the assignor to make the assignment. Here it made no inquiry. It assumed, therefore, the risk as to Mr. House's power to dispose of this stock. In assuming that he had the power it assumed no other risk, there being no circumstances calculated to excite the suspicions of a prudent man that a breach of trust was contemplated. Cook on Stock and Stockholders, Sec. 326.

The power of Mr. House under the will to dispose of this stock cannot be doubted. He had a right to sell, or distribute in kind to the legatees if not needed for payment of debts. It had not been specifically devised. "The one-fifth in value" of testator's personal estate given to his daughter, Fanny, might have been paid to her in money, bonds, or stocks, the beneficiary consenting. His assignment of these shares to her on account of her bequest was within his power. That he assigned the title absolutely was not breach of his trust. She took the title under the will and subject to the limitations of the will, and became herself charged with a trust in favor of the remainder-men.

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It might be conceded that he ought to have indicated on the certificate the limitations on her title. But it was not a breach of trust if he failed to do so. The corporation, who had no knowledge of the will, were certainly not in fault in registering the transfer as he had made it. Subsequently a trustee was appointed for the purpose of holding the estate of Fanny and preserving the trusts of the will. This certificate went into the hands of this trustee. While thus held it was in no danger of passing into the hands of an innocent purchaser without the joint concurrence of the trustee and life tenant in a breach of trust. The negligence of administrator or corporation in not ear-marking this stock was obviated when it reached the hands of a trustee charged with the duty of preserving the trusts of the will. The subsequent loss was the direct consequence of subsequent and independent acts of negligence and breaches of trust. This loss was not the proximate consequence of the remote acts of negligence now complained of.

We come now to consider the ground upon which the Chancellor seems to have rested his decree, viz., that the corporation was guilty of negligence in permitting the transfer of this stock to Victor Newcomb.

The contention of complainant is that the company had constructive notice of the fact that this stock was held by Mr. Smith as trustee, and that as trustee he had no power of sale, and that

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therefore it should have refused to transfer the shares to his assignee. The facts upon which the corporation is sought to be charged with notice are these:

After the appointment of Mrs. Baugh as trustee she executed receipts for a number of dividends. Some of these receipts were signed by her as guardian, others as guardian trustee, and others as trustee. After Mr. Smith's appointment he was directed by the secretary of the company to receipt as trustee.

The secretary, who paid them dividends and took their receipts, says that he supposed from Mrs. Baugh's receipts that she was guardian; that in point of fact he had no information of her being a trustee, or that Mr. Smith was her successor; that he required the latter to receipt as trustee because the stock stood in the name of a married woman, and that he used the term trustee as synonymous with agent.

The evidence of knowledge of a trust is unsatisfactory. But waiving this, and waiving the question as to the power of the trustee to sell, we shall rest our decision upon another question.

If a corporation transfer shares upon a forged assignment and power of attorney, or upon the authority of one wrongly assuming to be the agent of the owner, or upon a void decree or judgment, its act would be a nullity, in so far as it was thereby sought to affect the rights or status of the true owner as a share-holder. Such owner

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would remain a share-holder regardless of the illegal cancellation of the evidence of his right, and notwithstanding the issuance of a new certificate to the transferee in place of that canceled. His right would be no more affected by the taking up of his certificate without valid authority than it would be by its accidental destruction. A Court of Equity would compel the corporation, in either case, to recognize him as a share-holder by the issuance of a new certificate, and compel an accounting for dividends wrongly paid over to the transferee. *Telegraph Company v. Davenport*, 97 U. S., 369; *St. Romes v. Cotton-press Company*, 127 U. S., 614; *Dewing v. Perdicases*, 96 U. S., 193; *Pollock v. Bank*, 7 N. Y., 274; *Doing v. Salisbury Mills*, 125 Mass., 138; *Brown v. Howard Fire Insurance Company*, 42 Md., 384; *Hambleton v. Central Railroad Company*, 44 Md., 551.

But where the assignment of shares is made by the person appearing on its books to be the absolute owner, but the assignment was in *breach of trust*, then the liability of the corporation to the *cestui que trust* for transferring such shares depends not only upon its being shown that the corporation had either actual or constructive notice of the breach of trust, but upon its further appearing that its act in recognizing the assignment and making the transfer operated to aid the breach of trust and contributed directly to the loss of the stock by the *cestui que trust*.

If it be assumed that the facts known to the

corporation at the time of its transfer of these shares to Newcomb were sufficient to put it upon inquiry as to the terms upon which this stock was held, and as to the power of the assignees to make sale, and the purposes of such sale, then it should be held justly liable *for the injurious consequences to the cestui que trust of its act*, under such circumstances, in making the transfer to the purchaser. But if its transfer to him did not affect the rights and interests of the *cestui que trust*, by reason of the fact that the purchaser had acquired a good and indefeasible title *before such transfer*, then it would not be just to hold that it had aided in a breach of trust already consummated, or contributed to a loss already irremediable.

The rule on this subject has been well stated by Mr. Lowell in his recent and most valuable work upon Transfer of Stocks. "The liability of the corporation," says Mr. Lowell at Section 153, "for recording of transfers made in breach of trust depends very much upon the position of the purchaser. If he has acquired, before transfer on the books, a perfect title to the stock, free from all claims on the part of the *cestui que trust*, the breach of trust is complete before the corporation is asked to transfer, and when it records the transfer the corporation is merely doing what it is bound to do, and is not helping the trustee to commit the breach of trust. The corporation can therefore incur no liability to the *cestui que trust* by recording a transfer to a *bona fide* purchaser

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for value, unless there is a regulation making the stock transferable only on the books, and unless that regulation can be so construed that the act of the corporation is necessary to pass the title." To same effect see Sections 99, 100, 138, 149, 150.

The negligence of the corporation in permitting the transfer must be the efficient and proximate cause of the loss sustained by the *cestui que trust*. If the purchaser's title was complete without the transfer, then it cannot be the efficient proximate cause of the loss. Such a purchaser could compel a transfer to himself, and it would be the gravest injustice to hold the corporation responsible when its refusal would subject it to liability to the purchaser and in no way improve the case of the *cestui que trust*.

Let us apply this principle to the facts in this case. This stock stood in the name of Fanny Baugh. The certificate was issued to her. She joined her husband in assigning it to her brother-in-law, G. M. Rizon. This assignment and power of attorney to Rizon they acknowledged before the Clerk of the County Court. Mrs. Smith says she consented to a sale, and assigned the shares to enable her husband to make a sale, because he promised to invest the proceeds in other property. The transfer to Rizon, as before stated, was probably for the purpose of better enabling Smith to bring about a sale. Three months after date of this assignment, Smith and Rizon together made a sale to Clark, Dodge & Co., for cash, for full



market value. Subsequently they assigned the shares to N. Victor Newcomb. The latter, nearly ten months after date of Mrs. Smith's assignment to Rizon, sent the original certificate, with the assignments of Smith and wife to Rizon and Rizon to Clark, Dodge & Co. and Clark, Dodge & Co. to himself, to the secretary of the railroad company, and demanded a transfer on the books to himself. Under the facts shown in this record, there can be no doubt but that Clark, Dodge & Co., under whom Newcomb claims, were innocent purchasers, without notice of any limitations upon the title of Mrs. Smith, or of the fact that Smith himself held the shares as a trustee. As Newcomb obtained their title, it becomes unimportant to inquire as to whether he purchased from them with or without notice of complainant's rights, or whether they in fact bought only as his agents. Is such a purchaser protected against the claim of the defrauded *cestui que trust*? There can at this day be no serious doubt but that an innocent purchaser of shares for value from the apparent owner obtains an indefeasible title, and is unaffected by a secret defect in the seller's title. If the shares had stood in the name of Smith as trustee, this, under the weight of authority, would have put him upon inquiry as to the power of the trustee to sell. But here these shares were not so registered, and there was no notice in fact of a trust. Such a purchaser is protected against the claims of *cestui que trust*. While shares are

universally held to be non-negotiable in the sense of the law merchant, yet, as a species of property *sui generis*, they are something more than mere assignable choses. They have been called, for want of a better term, *quasi* negotiable securities. Mr. Justice Davis, in *Bank v. Lanier*, said of this species of property that "stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as possible." 11 Wall., 377.

The observation of Judge Freeman in *Cornick v. Richards*, 3 Lea, 1, that the purchaser of shares assigned in blank by the owner "must take subject to previous equities as any other assignee standing in the shoes of his assignor" was unnecessary to the decision; and in the subsequent case of *Cherry v. Frost*, 7 Lea, 1, the Court unanimously declared it to have been an inadvertent statement. The undoubted rule in this country is that a purchaser of shares from the apparent owner obtains a good title, notwithstanding such apparent owner may have been in fact a trustee and guilty of a breach of trust in making the sale. Cook on Stocks and Stockholders, Secs. 325 and 434. In *Cherry v. Frost*, *supra*, it was held that where a pledgee of stock assigned in blank

by the owner as collateral security, subpledged the certificate for money loaned to him, in ignorance of the owner's equity, the latter was entitled to hold the stock, as against the owner, to the extent of the consideration. In the later case of *Caulkins v. Gas Company*, 85 Tenn., 684, a purchaser of shares affected with a trust in the hands of the holder, he being but a life tenant, was protected against the remainder-men, the purchaser having bought for value and in ignorance of the defect in the title of the apparent owner. In *Hadley v. Kendrick*, 10 Lea, 525, the purchaser of gas stock from an executor who sold in breach of his trust, the stock having been specifically bequeathed to one for life with remainder over to others, was protected.

The title of the purchaser upon the assignment of the certificate was complete without registration or transfer on the stock books of the corporation. The rule requiring transfer on the books of the company, by the well-settled line of decisions in this State and by the great weight of authority in the Courts of America, is a rule made solely for the benefit of the company. By it the company is enabled to know who are entitled to vote and to whom it may pay dividends. A complete equitable and legal title passed by the act of the owner in assigning the certificate, and the subsequent registration of this assignment and issuance of a new certificate in no way affected the rights of the *cestui que trust*. The breach of trust was

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complete before the corporation was called upon to transfer the shares, and it had no right to refuse a transfer. *Cornick v. Richards*, 3 Lea, 1; *Cherry v. Frost*, 7 Lea, 1; *Bank v. Farrington*, 13 Lea, 333; *Bank v. Planing Mill Co.*, 86 Tenn., 252; *Caulkins v. Gas Co.*, 85 Tenn., 683; Lowell on Transfer of Stocks, Secs. 93, 103, 95, 96, 153; Cook on Stocks, Sec. 381.

That Mrs. Smith was a minor at the time of the sale and at date of transfer on the company's books, cannot affect the question of the company's liability for making the transfer. The transfer of shares by a minor is voidable, not void. It is one of those acts which may or may not be to the interest of the minor. To say that every sale of shares by a minor was void would be disastrous to them in most cases. It is like the sale of lands or any other sort of property by a minor. If the act on its face is not such an one as is manifestly injurious to the minor, it will be held voidable merely at the election of the minor. This is the rule in this State concerning sales and conveyances by minors. *Wheaton v. East*, 5 Yer., 61; *McGan v. Marshall*, 7 Hum., 125; *Barker v. Wilson*, 4 Heis., 269. The same rule has been applied to the purchase and sale of stocks by minors. *Lumsden's Case*, the Law Reports, Chancery Appeal Cases, Vol. IV., 31; Cook on Stocks, Secs. 318 and 427; 10 Am. and Eng. Ency. of Law, Vol. X., 635.

The sale being only voidable at the election of

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the minor, the corporation had no right to refuse a transfer, it not having been avoided at date of transfer. Mr. Lowell, on Transfer of Stocks, at Section 138, says: "It is, however, of no consequence that the title of the purchaser is voidable, if it has not in fact been avoided, because by the definition of the term voidable the title of the purchaser in such a case is valid until avoided."

The decree of the Chancellor must be reversed as respects the Nashville & Decatur Railroad Company. Complainants will pay all the costs of the causes.

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## SPURLOCK v. BROWN.

(Nashville. February 27, 1892.)

1. WRITTEN INSTRUMENTS. *Knowledge of contents by maker. Presumption. Estoppel.*

The presumption obtains that the maker of a written instrument, who had capacity and opportunity to examine and understand it before signing, was acquainted with its contents. This presumption becomes conclusive, and estops the maker to show the contrary, where he stated at time of signing that he had read the instrument, and this admission was acted upon by others in matters affecting their rights. (*Post*, pp. 247, 248.)

Cases cited and approved: *Miller v. Denmon*, 8 Yer., 237; *Rice v. Bank*, 7 Hum., 41; *Gardner v. Stanfield*, 12 Heis., 150; *Frazier v. Bassett*, 1 Overton, 299.

2. WITNESS. *Corroboration of by his confirmatory statements not allowed, when.*

A witness, the maker of a written instrument, testified that he did not read the paper, and was not acquainted with its contents before signing it. He admitted that he stated to the other party and the subscribing witnesses at date of signing that he had read the paper, and this admission was proved by other witnesses. In corroboration of witness' testimony that he had not read the instrument before signing, his confirmatory statements, made recently after the signing, but not part of the *res gestæ*, were offered in evidence.

*Held*: These confirmatory statements are incompetent. (*Post*, pp. 248-251.)

Cases cited and distinguished: *Hayes v. Cheatham*, 6 Lea, 10; *Glass v. Bennett*, 89 Tenn., 479.

3. ANTENUPTIAL MARRIAGE-CONTRACT. *Marriage alone sufficient consideration for.*

An antenuptial marriage-contract, obtained and entered into fairly and understandingly, whereby the wife, upon consideration of the marriage alone, agrees to relinquish all claim to the husband's property,

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constitutes an absolute and effectual bar to her suit seeking to assert her rights as widow in her husband's estate. Marriage alone is a sufficient consideration for such relinquishment. In such case it is immaterial that the husband had a large estate, and that no disclosure of this fact was made to the wife, and that no adequate provision was made for her. (*Post*, pp. 254-258.)

Cases cited and approved: 25 Md., 538; 86 Ky., 114; 116 Ind., 545; 53 Vt., 54; 33 Kan., 460; 69 Me., 247; 95 N. C., 476.

4. SAME. *Construction of.*

But such contract is based upon a pecuniary consideration, and not upon that of marriage alone, where, having been made after the parties became engaged, the husband, "in consideration of the consummation of said marriage," conveyed certain property to the wife, and the wife, "in consideration of the said conveyance," relinquished all interest in the husband's estate. And, in such case, the relations of the parties are confidential, and the wife will be relieved of her contract if she has acted in ignorance of her pecuniary rights superinduced by the husband, although there may have been no intentional fraud. (*Post*, pp. 258, 259.)

5. SAME. *Case in judgment.*

S. and M., having engaged to marry each other, entered into an antenuptial marriage-contract, whereby S. gave M. a life-estate in a house and lot worth about \$6,000, and M., in consideration thereof, relinquished all interest in S.'s estate. M. was forty years and S. sixty-three years of age. This contract was prepared by S.'s attorney, who undertook to explain it to M., who had no other adviser. S. had then and at his death an estate of about \$100,000. M. had about \$3,700 personal estate, which passed to S. by virtue of the marriage. No issue was expected and none came of this marriage. There was no actual fraud on the part of S. or his attorney, but M. was not informed that her \$3,700 became the property of S. by virtue of the marriage, and was induced to believe by S.'s despondent views of his affairs that he had but a small estate.

*Held*: M. is not bound by this contract. It is without adequate consideration, and entered into under mistake of both law and fact. (*Post*, pp. 243-246, 258-260.)

Cases cited and approved: *Drew v. Clark*, Cooke, 374; *Warren v. Williamson*, 8 Bax., 431; *Trigg v. Read*, 5 Hum., 533; *Dalton v. Wolfe*, 11 Heis., 502; *Sparks v. White*, 7 Hum., 87; 9 Hum., 82; 98 U. S., 91.

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6. SAME. *Same.*

And this contract is not cured of its infirmity by the fact that S. subsequently gave M. his note for the \$3,700 he obtained of her by the marriage. (*Post*, p. 265.)

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FROM DAVIDSON.

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Appeal from Chancery Court of Davidson County.  
ANDREW ALLISON, Ch.

VERTREES & VERTREES for Spurlock.

EAST & FOGG, MARKS & MARKS, and B. F. SOUTH  
for Brown.

DICKINSON, Sp. J. On January 4, 1884, complainant was married to S. B. Spurlock. On December 24, 1883, after the parties became engaged, a marriage-contract was executed by complainant, who was then Margaret Mallon, and Spurlock, by which he conveyed to her an estate for life in a house and lot, and she agreed as follows:

"And I, the said Margaret Mallon, contract and agree with the said S. B. Spurlock, in consideration of the above conveyance, upon the consummation of said marriage, to accept the above as my portion of his property, either real, personal, or mixed, moneys, choses in action, or accounts, and I do hereby relinquish all my rights of dower or home-



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stead in any real estate said Spurlock now has, or may have; and in case said Spurlock should die before I do, I hereby relinquish all and every interest in his estate I may or would be entitled to in consequence of said marriage."

Complainant had been in business, and had accumulated about \$3,700, which, at the time this contract was made, and at the time of her marriage, was loaned to Spurlock. Nothing was said by the contracting parties in regard to this money, nor of the effect of the marriage upon it. On March 13, 1890, about a year before his death, he executed and gave to her his note for this money, with some interest, aggregating \$3,735.50, conditioned that it should not bear interest during his life. Spurlock died January 23, 1891, leaving no descendants. Respondents are his next of kin. His estate at his death was worth, net, about \$100,000. If there were no marriage-contract, complainant, as sole distributee, and for dower, would succeed to an estate worth about \$50,000.

She filed her bill setting up these rights. In it she discloses the marriage-contract and attacks its validity as a bar to her claims. The answer specifically denies every material allegation of the bill, and controverts every proposition of law relied on by complainant. It avers that she executed the contract freely, understandingly, and for a sufficient consideration. It relies upon the contract as an equitable bar to complainant's legal rights in Spurlock's estate.

At the time of the marriage complainant was about forty years of age. She was a divorced woman, and her husband was then living. She had two children by this husband, but both had died. Her life had been a severe struggle. She married in Ireland at sixteen, and soon thereafter, being deserted by her husband, went by a sailing vessel to Australia, where she supported herself for six years as a domestic servant. She returned to Ireland, and then, a reconciliation having taken place, joined her husband in Nashville. She procured a divorce from him on the ground of his cruelty. She entered in the grocery business, catering to those in the lowly walks of life. She was industrious, thrifty, smart, and economical, and in addition to supporting herself, she gradually accumulated from the business which she conducted. The record shows that she was a quiet, unobtrusive woman, and that her reputation was good.

Spurlock, at the time of the marriage, was about sixty-three. Early misfortune had permanently impaired his health and caused him to withdraw from social life. He was a wholesale grocery merchant, and Mrs. Mallon was his customer. He knew her for years before her marriage, was familiar with her surroundings, and was her business adviser. It is in proof that he did not expect any children from the union. At the time the contract was made he was largely in debt, but his estate then was worth, net, fully as

much as it was at his death. There is an effort to show that complainant contrived the marriage, but the proof does not sustain it. His letters, written to her two years before the marriage, plainly manifest a deep and tender interest in her, and he was a regular visitor for some months before the marriage. Her origin and antecedents were humble, but she, so far as this record shows, had achieved a competency for herself by her own efforts, and had maintained a reputable character. His antecedents and family position were good, but, constrained by a misfortune, he had banished himself from the social orbit in which he might have moved. His life was lonely, his health impaired, and he was approaching inevitable decrepitude. Leaving out all consideration of pecuniary benefits, there certainly was no advantage in his status over hers—nothing to make marriage a condescension on his part. Their marriage appears to have been happy, and the proof shows that she was a thrifty and attentive wife, who nursed him tenderly in his long and painful sickness.

Complainant avers that she was induced to sign the instrument by Spurlock, who represented to her that it was meant only to save her the annoyance of going to the court-house to acknowledge deeds to his property, and that it did not cut her off nor affect her rights as wife. This direct charge of unmitigated fraud is in strange contrast with her repeated assertions in her testimony that Spurlock was a most honorable man, who never did lie nor wrong any one.

The contract was written, at the request of Spurlock, by G. J. Stubblefield, who then was a lawyer at Nashville. He testifies that he went, at Spurlock's instance, to read and explain it to Mrs. Mallon, and that he did so and left it with her after Spurlock had introduced him and retired. She denies that there was any such interview. The law would presume that she knew the contents of the paper she executed, it appearing that she was not illiterate. She admits that, on the day the contract was signed, it was in her possession about twenty-five minutes while Spurlock went to get G. J. Stubblefield and Hiram Stubblefield to witness it, and that she told them when they came that she had read the paper and would sign it. The paper is so plain and simple that any person of ordinary intelligence could understand that it cut off all her rights as wife in Spurlock's property. Complainant was a person of more than ordinary intelligence, and for years had successfully engaged in business. These two subscribing witnesses testify that she said before she executed it that she had read it and understood it. She admits that she told them that she had read it. She now says that she did not in fact read it, and that she did not know its contents.

An admission, though not conclusive against the party making it (12 Heis., 150; 7 Hum., 41), is, when made freely and without any qualification, the highest evidence. *Miller v. Denman*, 8 Yer., 237. To overcome it, the proof must be full and

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unquestionable. *Rice v. Bank*, 7 Hum., 41. Like other parol evidence, it is subject to be weighed with other proof, and may be controlled; but it is obligatory if others, in conforming their actions to it, acquire rights with the knowledge of the person making it. 1 Overton, 299. This rule becomes more binding when the admission is solemn, and is made the foundation for the execution of a written contract.

To corroborate complainant, two witnesses testify that she told them, on the day the contract was made, that she had signed a paper for Spurlock without reading it.

In *Hayes v. Cheatham*, 6 Lea, 10, the Court says: "The rule is that where it is attempted to be established that the statement of a witness on oath is a recent fabrication, or where it is sought to destroy the credit of a witness by proof of contradictory representations, evidence of his having given the same account of the matter at a time when no motive existed to misrepresent the facts ought to be received, because it naturally tends to inspire confidence in the sworn statement." This rule was approved in *Glass v. Bennett*, 5 Pickle, 479. It is sometimes a matter of nice judgment to determine that no motive, at a given time, existed to misrepresent the facts. It could not be assumed in this case that no such motive existed at the time these declarations were made, for if the testimony of G. J. Stubblefield that he had read and explained the contract to her be

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true, then these statements could have been made with no motive except to misrepresent facts and lay the foundation for just such a contest as this. But this testimony does not come within the rule, and for a more conclusive reason. No effort was made to discredit her testimony as to what occurred when the contract was executed, and no corroboration on this point was needed. The attempt is on her part to show that she made conflicting statements, and to have those made after the transaction, and not as a part of the *res gestæ*, override a solemn admission made by her before subscribing witnesses. There was no *duress* nor compulsion when she made this admission. To allow it to be overridden by subsequent conflicting statements, would be to subvert the foundation upon which all solemn contracts rest. There is no rule under which such evidence would be competent. A number of witnesses testify to conversations had with her during her marriage, and before any question of contest was mooted, which disclose that she knew of the marriage-contract and understood its effect upon her marital rights in his estate. These witnesses are interested and prejudiced, but so is she. The weight of testimony is strongly against her, but, independent of it and of the evidence of Stubblefield that he read and explained the contract to her, we hold that her own testimony and that of the witnesses introduced to corroborate her, though unexcepted to, is insufficient to overcome her solemn acknowl-

edgment, freely made, that she had read the paper and understood it.

To sustain complainant's declaration that she did not know and was misled as to the contents of the contract, and for the further purpose of showing that it is not binding because not within the contemplation of either contracting party, it is contended that Spurlock himself was ignorant of its real effect. It is argued that Stubblefield proves that the contract, as prepared by him, goes beyond the written memorandum given him by Spurlock as a basis of the instrument, and that this memorandum did not cut off her marital rights; and further, that this fact, taken in connection with statements made by Spurlock to purchasers of realty from him, fully demonstrates that he did not understand that the agreement cut her off from his estate, thus confirming her testimony that he induced her to sign it by stating that it was a mere paper to save her from trouble and annoyance, and that it did not affect her rights as wife.

It is true that Stubblefield states that the memorandum furnished by Spurlock only contained, so far as he could remember, a description of the bounds of the lot, a provision for a life estate in her, and a disposition of the remainder. He states further that he might not remember every thing. He says that Spurlock came to him to write a marriage-contract, and that he came back in some days, when witness read to him the contract he had prepared, it being the same one subsequently

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executed, and that Spurlock said it was as they had agreed; that he then asked Spurlock what she would live on, and he replied that she was no pauper, and that she had between three and four thousand dollars in his hands, besides the house he was going to give her. This witness is disinterested and uncontradicted on this point, and his credibility is not assailed except as to memory, and that not successfully.

The proof shows that Spurlock was a successful business man, who had dealt frequently in real estate. It is most improbable that a man of this character would have taken the precaution of having two witnesses go to her home to attest her signature to an instrument which was wholly for her benefit; and it is still more improbable that he did not know the contents of a paper executed by him on such an occasion and with such solemnity.

One Williams testified that he bought a lot from Spurlock in 1889, and that, in response to his inquiry as to the necessity for Mrs. Spurlock to sign the deed, Spurlock said: "No; that he had a marriage-contract with his wife, which he made *so as to save her* from having to sign deeds." This is but a report of a conversation, which is weak testimony at best. If he had said that Spurlock stated he had a marriage-contract with his wife, and that it was so made that she did not have to sign deeds, the testimony would not be significant. He not only undertakes to state the effect,



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which was all that was important so far as his affair was concerned, but to reproduce language so nicely framed as to express a purpose for which the marriage-contract was made. Such testimony should be received with great caution. This witness reports Spurlock, in the same conversation, as making statements in regard to his provision for his wife which the record shows to be absolutely untrue. Besides, he was a reticent man about his private affairs, and it is most improbable that he would have been so free, on such an occasion, with his confidence. This witness is contradicted by Holman, to whom he claimed to have repeated Spurlock's statement.

Another real estate purchaser testifies that Spurlock said: "I have signed a paper of about \$35,000 to her; that she would not have to go all over the State and county signing of his deeds for such land as he might sell." This testimony is discredited by the statement that the paper gave her \$35,000, which Spurlock could not have made without telling a conscious falsehood, and the absurdity of saying she would otherwise have to go all over the State to sign deeds. Independent of these ear-marks of invention, the language as reported does not conclusively declare the purpose for which the contract was made, but rather expresses the effect.

This is all the evidence, besides her own testimony, going to show that Spurlock did not know the scope of the contract. It weighs for nothing

against the testimony of Stubblefield and the actual execution of the instrument. Besides, Hoke, who was his confidential clerk, testifies that Spurlock, on the day before his marriage, told him that he had entered into a marriage-contract that would secure his property to his relatives. Cooley, a disinterested witness, says he told him after his marriage that he wanted his property to go to his sisters and their children. The fact of his giving her his note for the money he had borrowed of her, when he was very sick and after his arm had been amputated, is a strong circumstance to show that he knew she was cut off from his estate; for otherwise it would have been entirely unnecessary for her protection, inasmuch as she would have succeeded to all of his personalty if he died intestate. His knowledge that she would take nothing doubtless caused him to secure this money to her.

The evidence shows to our entire satisfaction that both Spurlock and his wife executed the paper knowing it was a marriage-contract, and that it cut off her marital rights in his property.

The proof clearly shows that all question of the money he had borrowed of her was, on making the contract, passed over *sub silentio*.

She surrendered all prospective marital rights in his estate, then worth, net, \$100,000, and received a life estate in realty which had cost him, two months prior to the marriage, but \$5,000, and on which he had spent in improvements about \$1,000.

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She insists that a marriage-contract, being cognizable only in a Court of Equity, will not be enforced unless the provision made for her be fair, reasonable, just, and equitable.

It is contended for defendants that marriage alone is a sufficient consideration to sustain any antenuptial agreement the parties may make respecting present or future rights in the property of each other.

The authorities are much in conflict. One class of cases view the interposition of the contract as merely an equitable bar, which is held conclusive provided it be entered into freely and understandingly. The other class treat the reliance on it as an invocation to the Court for its active interposition to enforce it specifically; and inasmuch as specific performance is not an absolute right, but is always within the discretion of the Court, they proceed to apply to the contract the usual tests to determine whether, under all the circumstances, the agreement is fair, just, and equitable, and especially whether the consideration be adequate. The methods of treating the contract would not produce such conflicting conclusions were it not for the high estimate put by one line of authorities upon marriage as a consideration and its entire pretermission by the opposing line, which seems to look only to the pecuniary features of the transaction.

In *Naill v. Maurer*, 25 Md., 538, and *Forwood v. Forwood*, 86 Ky., 114, marriage alone is held to be a sufficient consideration to sustain an ante-

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nuptial settlement. In the latter case the Court says: "The consideration of marriage is not only regarded as sufficient to uphold an antenuptial contract, but the consideration may be regarded by the woman as of inestimable value to her—a value that would by far outweigh her property rights in the estate of her intended husband."

The same rule, though not necessarily involved in the decisions, and therefore not authoritatively adopted, is approved in the following cases: *McNutt v. McNutt*, 116 Ind., 545; *Mann v. Mann*, 53 Ver., 54; *Hafer v. Hafer*, 33 Kan., 460; *Wentworth v. Wentworth*, 69 Me., 247; *Brooks v. Austin*, 95 N. C., 476. The case of *Peet v. Peet*, 46 N. W. Rep., 1051, cited to sustain this view, is not in point, and by implication rests on the opposing doctrine.

The following authorities hold that the contract to be enforced must secure a provision for the wife not unreasonably disproportionate to the means of the intended husband: 2 Scrib. Dow., 424 (2d Ed.); *Gould v. Womack*, 2 Ala., 83; *Woerner Am. Law Admn.*, 1, 264; *Kline's Estate*, 64 Penn. St., 122; *Ruth Bierer's Appeal*, 92 Penn. St., 265; *Pierce v. Pierce*, 71 N. Y., 154; *Tarbell v. Tarbell*, 10 Allen, 278; *Shea's Appeal*, 121 Penn. St., 302; *Stetter v. Folger*, 14 Ohio, 647; *Smith's Appeal*, 115 Penn. St., 319; *Neeley's Appeal*, 124 Penn. St., 406; *Ludwig's Appeal*, 101 Penn. St., 535.

The common law cherished nothing more than the right of dower. The wife was dowable in one-

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third of the lands seized and possessed by the husband during coverture. And yet this right could be effectually barred by a jointure in lieu of dower made before marriage with her consent, without regard to the adequacy or inadequacy of the provision. In this State her right of dower only attaches to the land owned by her husband at his death. He may (excepting homestead) sell without her consent every foot of land and squander the proceeds, and defeat her dower absolutely. It is subject to every vicissitude of business venture, and is a most precarious expectancy. She may not survive him, and if she do, the period of her enjoyment may come when its value, measured by her prospect of life, may be reduced to a minimum. There is no standard by which a Court can, as of the time an antenuptial settlement is made, value such a future right. The same infirmities and uncertainties, though in an increased ratio, apply to her expectancy as distributee of personalty, the additional one of children to share being in most cases probable. If a Court shall take the value of his estate when the contract is made as a criterion, it will happen often that the provision assumed on this basis to be just will far exceed what she would have gotten after a life's shipwreck in the absence of a contract. On the other hand, the conditions may be reversed. The problem is to estimate what is a reasonable consideration for surrendering a future estate involved in so much doubt and hazard. The rule contended for

would be variable in its results, according to the ideas of different judges as to what provision would be reasonable. It is plain that under this rule no such settlement would in any sense have any sanctity as a contract. It could have no fixed character until the judges, before whom it finally came, had decided whether it be reasonable. The fullest disclosures of property might be made, the advice of friends and lawyers be invoked, all solemnities of execution and acknowledgment be observed, and yet it would be a mere problem as to what would be reasonable projected into the future, to be decided perhaps by an unborn judge according to his peculiar notions, not confined by definite rules, and formed at a different period of time under the influence of changed conditions of society. This rule leaves out of view entirely marriage as a consideration.

Where a settlement made by the husband on the wife, without fraud on her part and in consideration of marriage, has been attacked by creditors, it has been uniformly sustained, and all the authorities concur in saying that marriage is the highest consideration for such a settlement. It is a sufficient consideration from the woman to enable her to take all of her intended husband's estate from his creditors. In our opinion there is no sound reason why she may not, if of age and acting freely and understandingly, agree, in consideration of the marriage alone, to give up the pecuniary benefits that would come from it. The

value of the marriage can be estimated by no one as well as herself; and if it be accepted by her freely, as an equivalent for monetary sacrifices, the Courts should not interfere after she has obtained the marriage she contracted for, no matter how great such sacrifices may be, provided she was not misled.

In this case the contract recites that a marriage is to be solemnized, and then proceeds as follows: "I, S. B. Spurlock, in consideration of the consummation of said marriage, do hereby and herein give," etc. When the portion binding her is reached, it says: "And I, the said Margaret Mallon, contract and agree with the said S. B. Spurlock, in consideration of the said conveyance," etc. Marriage is not made a consideration for her agreement. It need not be specifically mentioned as a consideration. *Naill v. Maurer*, 25 Md., 538. But here the terms of the instrument confine the consideration expressly to the conveyance made to her. Being so exactly limited in a contract drawn by his lawyer, it may well be held to have been entirely pecuniary. When this contract was made, the engagement to marry had been entered into. By the engagement she acquired a valuable right which, in case of a breach of contract, could have been enforced, and measured with reference to Spurlock's estate. She could have refused to sign the contract without impairing her right to have the marriage consummated or to enforce indemnity for a refusal.

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Spurlock must have known that her marital rights, if not cut off, would in all probability be very valuable. Defendants prove that he took his own lawyer to her to explain the instrument. The relations of the parties had become confidential. He voluntarily assumed the office of having her instructed in respect of the agreement, and introduced Mr. Stubblefield to her for that purpose. Mr. Stubblefield testifies that he said nothing to her in regard to the effect of the marriage upon her rights to her own money, either in the absence of a contract or under the contract proposed. He says that, in his opinion, the money, if repaid to her before marriage, would have remained her separate estate. If he entertained this erroneous idea, it is not reasonable to suppose that she knew that she was surrendering her money. It does not appear that the question of her money was in any way considered, although her rights in it were to be affected by the marriage. Stubblefield shows that he did not contemplate it. It is evident from his testimony that he did not advise her as to the rights she had acquired by the engagement. She had a right to expect a fuller exposition of her legal status in respect of the purely money bargain she was making than she received.

It is manifest that she was not put in a position to deal intelligently with her rights. The result justifies this conclusion. Spurlock, by the marriage, acquired the absolute right to the \$3,700



he owed her. She gave up all her rights in his estate. She got a life estate in a house and lot which, with improvements, had just cost him about \$6,000. She was forty years of age. The life estate could not have exceeded, if it equaled, in value the amount of money she surrendered by the marriage. She practically, then, under the marriage and the contract, got nothing, and so surrendered for nothing, and not in consideration of the marriage, a legal right acquired by the engagement, which Spurlock was bound to know had great prospective value.

This is not a case simply of ignorance or mistake of law on her part. This, standing alone, cannot be relieved against. Other elements exist in the transaction. Those in whom she had confidence, upon whom she had a right to rely, procured from her (though certainly, so far as Stubblefield is concerned, not with wrong intent), for an expressed pecuniary consideration, a contract most detrimental to her; and, though voluntarily assuming to instruct her, they failed to advise her as to her legal rights and as to the real consideration she was getting under the combined effects of the contract and the marriage.

Mr. Pomeroy thus states the rule: "If the mistake of law is not pure and simple, but is induced or accompanied by other special facts giving rise to an independent equity on behalf of the mistaken person, such as *inequitable conduct of the other party*, there can be no doubt that a Court of Equity

will interpose its aid." Equity Jurisprudence, Sec. 842.

A mistake in law, produced by the representations of the other party, is as good a ground for relief in equity as a mistake in fact. *Drew v. Clark*, Cooke, 374. If a party, acting in ignorance of a plain principle of law, give up an indisputable right under the name of a compromise, equity will relieve from the effect of such mistake where, accompanying it, there is ignorance, weakness, or *misplaced confidence* upon the one side, or an unconscionable advantage is obtained. *Warren v. Williamson*, 8 Bax., 431; *Trigg v. Head*, 5 Hum., 533. A widow, ignorant of her legal rights, yielded to an administrator property which was exempt. This Court, through Chief Justice Nicholson, held that she acted in ignorance of her own rights under the law as widow, and that it was the administrator's duty to communicate to her what her rights were. *Dalton v. Wolfe*, 11 Heis., 502. A mere naked ignorance of the law will not be sufficient to authorize a Court of Chancery to set aside a contract, but *if that ignorance be superinduced by the other party*, or if there be *misplaced confidence*, or if advantage be taken of the weakness of intellect so as to obtain property at a greatly inadequate price, these and other influences mixed with ignorance of law will be sufficient. *Sparks v. White*, 7 Hum., 87.

In *Wheeler v. Smith* the Supreme Court of the United States set aside a release from an heir at

law to executors, made for an inadequate consideration under a mistake of law and some undue influence. The heir was influenced by the honest, though erroneous, opinion of one of the executors, who was a lawyer in whom he had confidence. He, however, had no interest in the result. The Court said: "The complainant, it seems, had studied law, but it is manifest from the facts before us that he was but little acquainted with business, was an inefficient and dependent man, easily misled, especially by those for whose abilities and characters he entertained a profound respect. \* \* But in making the compromise the parties did not stand on equal ground. \* \* \* He did not act freely and with a proper understanding of his rights." 9 How., 82.

The Court reformed a contract made in mistake of law through a reliance upon the representation, honestly made by the company's agent, that the insurance in the form adopted would give the protection sought. The party relied upon the larger experience and greater knowledge of the agent. The Court says: "In deciding, therefore, as we do, that the complainants are entitled to have the policy reformed in accordance with the original agreement, it is not perceived that we enlarge or depart in any just sense from the general and salutary rule that a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts." *Snell v. Insurance Co.*, 98 U. S., 91.

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Mr. Lawson thus states the doctrine: "But the common law rule, which refuses relief against ignorance or mistake of law, and which is equally applicable in Courts of Law and Equity, is not enforced in equity where such ignorance or mistake is induced by fraud or imposition, or undue influence, or *an abuse of confidence*, springing out of the peculiar relations existing between the parties." Rights and Remedies, Sec. 2341.

Complainant was not dealing at arm's length nor under the advice of her own counsel. Assuming to instruct, they should have done so fully, and she had a right to presume that such was the case. A failure to so advise, where such close confidence is reposed, whether purposely or through ignorance or misapprehension, is equivalent to positive misadvice.

There is another important fact which has great weight, and must be considered as one of the controlling elements in the transaction. She testifies that Spurlock told her that he was heavily in debt, and made the impression on her that he was not worth much. Other witnesses testify that he frequently spoke of being oppressed by his large indebtedness, and thus she is corroborated. Thus the impression produced by him was calculated to influence her to yield, as of little value and for an inadequate consideration what, upon full information, would have been apparently of great value. If the contract was freely entered into in consideration of marriage, the disproportion between the

estate and the settlement is no ground for presuming that proper information in regard to the value of the husband's estate was not possessed. In such a case there is no necessity for a disclosure. The case is different where the contract relates in terms to a money bargain, and it affirmatively appears that misleading impressions were made, and that the opposite party in interest, who undertook to advise her of her rights and upon whom she, from the confidential relations existing between them, relied, failed to give her such instructions as would fairly put her in a position to judge of the rights which she was yielding; and when these facts concur, and the contract made is greatly to her disadvantage, a Court of Equity will not give it effect. That she may have entered into the contract, even with a full understanding, is not the question. The Court cannot speculate about this. We hold that, under the facts stated, it was not fairly obtained, and therefore we cannot sustain it as an equitable bar to her rights. It can make no difference that Spurlock subsequently gave her his note for this money. This was, in law, nothing but a gratuity. The money became his absolutely by the marriage, no matter what he may have thought about it. It was in no way secured to her, and was liable for his debts. He had it entirely in his power to dispose of it in any way he might choose. He could not, by giving it to her subsequently, thus putting her in as good a position as if it had been reserved or voluntarily

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- yielded by the contract, destroy her rights in his estate which had not, by the agreement made under the facts as they existed, been impaired beyond equitable remedy. No subsequent bounty, be it ever so munificent, could cure the infirmities of such a transaction, and convert it into a binding agreement.

The decree of the Chancellor is affirmed.

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DISSENTING OPINION.

LEA, J. I cannot agree to the conclusion reached by a majority of the Court in this case. The Court correctly, as I conceive, holds that the marriage-contract was executed by Mrs. Spurlock with a full knowledge of its terms; but because she was not informed of the legal effect of marriage upon some money she had loaned Spurlock before marriage, the marriage-contract is to be set aside, and not to be held binding on her. If she understood, as I agree with the Court she did, the terms of the marriage-contract, that it was explained to her, knew the effects thereof, knew what she was to get from his estate in the event of marriage, and then signed and acknowledged it, she, after marriage, is bound thereby, although she may have been ignorant of the effect in law of marriage upon some money she had loaned Spurlock before marriage. It does not affirmatively

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appear that she did not know the law. Nothing was said by her about it, and no inquiry was made, and no explication given.

The result is, that although the marriage-contract was well understood by her, and fully explained, yet, because it does not affirmatively appear she knew the legal effect of marriage upon some property of hers, the contract must be held invalid and of no force and effect, and this though no inquiry was made and no thought given the subject by either party. The parties evidently had an understanding in regard to this money, for, after the marriage, she demanded and he gave his note for the amount, which she held at the time of his death. Such a ruling by this Court would virtually do away with all marriage-contracts, for if the wife had *any* property, however insignificant in amount, at the time of signing the contract and marriage, and after many years it could not be affirmatively shown that she knew the legal effect of marriage upon said property, the contract would not be binding, however well its effects and terms were known and understood by the parties. Such certainly never was the law, as I think, until this decision, from which I respectfully dissent.

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## LANCASTER v. THE STATE.

(Nashville. February 27, 1892.)

1. MURDER. *Verdict for murder in first degree upon circumstantial evidence approved.*

This Court approves the verdict for murder in first degree, with sentence of death, rendered in this case upon circumstantial evidence alone. The facts are fully set out in the opinion of the Court. (*Post*, pp. 269-284.)

2. CHARGE OF COURT. *Correct as to circumstantial evidence.*

Court's charge in a murder case upon the subject of circumstantial evidence is correct in this language, viz.: "In order to warrant you in convicting the defendant in this case, the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt; for, before you can infer his guilt from circumstantial evidence, the existence of circumstances tending to show his guilt must be incompatible and inconsistent with any other reasonable hypothesis than that of his guilt." (*Post*, p. 285.)

3. CRIMINAL PRACTICE. *Oath of jury. Recital of.*

The recital in an order impaneling jury in a felony case that the jurors were "elected, tried, and sworn well and truly to try the issues joined," shows a sufficient swearing of the jury without adding "and true deliverance make," or other words. (*Post*, pp. 285, 286.)

Cases cited and approved: *Fitzhugh v. State*, 13 Lea, 260; *Baxter v. State*, 15 Lea, 657.

Cited and distinguished: *Hargrove v. State*, 13 Lea, 179.

4. SAME. *Officer's oath sufficient. Recital of.*

The recital in an order impaneling jury in a felony case that the officer in whose charge the jury were placed was "sworn as required by law" or "according to law," is sufficient without setting out the language of the oath administered. (*Post*, pp. 286, 287.)

Case cited and approved: *Taylor v. State*, 6 Lea, 235.

Cited and distinguished: *Buxton v. State*, 89 Tenn., 216.



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5. SAME. *Same.*

And this correct recital is not vitiated by recitals in subsequent respite orders that the jury returned into Court in charge of their officer "heretofore sworn to *keep them*." (*Post*, pp. 286, 287.)

6. SAME. *Verdict not set aside upon defendant's unsupported affidavit.*

The verdict in a murder case will not be set aside upon the unsupported affidavit of the defendant, averring misconduct of jury upon information and belief. (*Post*, pp. 287, 288.)

7. SAME. *Same.*

Nor will such verdict be set aside because the Court refused to call the jurors, upon defendant's motion, to impeach their verdict upon the ground that they did not believe the defendant guilty. Such affidavits cannot be heard by the Court. (*Post*, pp. 288, 289.)

Case cited and approved: *Hannum v. State*, 90 Tenn., 647.

8. SAME. *Court may disregard jury's finding of mitigating circumstances.*

The trial Judge may, in his discretion, disregard the jury's finding of mitigating circumstances in a murder case and refuse to commute the sentence from death to imprisonment for life. Such action of the trial Judge is approved in this case. (*Post*, pp. 289, 290.)

Code construed: § 6098 (M. & V.); § 5257 (T. & S.).

Cases cited and approved: *Greer v. State*, 3 Bax., 322; *Lewis v. State*, 3 Head, 127, 150.

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FROM GILES.

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Appeal in error from the Circuit Court of Giles County. E. D. PATTERSON, J.

J. P. ABERNATHY for Lancaster.

Attorney-general PICKLE for the State.

CALDWELL, J. Larkin Lancaster, the appellant, is under sentence of death for the murder of Zack Dixon. He has been three times tried by Court and jury with same result. The judgment of the Circuit Court has been twice reversed in this Court, and the case is now here for the third time. A new trial is sought on several grounds. In the first place, it is contended that the conviction is not sustained by the evidence; that the proof shows neither the *corpus delicti* nor the identity of appellant as the murderer.

Zack Dixon, who is alleged to have been murdered, was a black negro boy, seventeen years of age, and residing on a farm near Pulaski, in Giles County. He was last seen by the witnesses at his mother's house, and at other places in that county, on the first Sunday in November, 1888, and has not been heard from since his disappearance—after sundown of that day. He expressed no purpose of leaving the county, made no preparations to leave, and no reason is shown why he should have done so. He was an industrious, well-behaved boy, and left behind a matured cotton crop, some clothing, and other property, which he made no effort to dispose of in any way, and has never called for himself.

On the first day of December, some three weeks after the sudden and unexplained disappearance of Zack Dixon, the headless body of a male negro, about his size, was found near Hick's Bluff, two and one-half miles below Pulaski, in Richland

Creek, several miles from where he was last seen by the witnesses, the trunk, with arms attached, being confined by a piece of rope in one sack, and the severed legs tied up in another sack. In each sack was also a heavy rock, used as a sinker, and in the one containing the legs was a butcher-knife. One of these sacks was *tow* and the other *cotton*. An inquest was promptly held, and the body was viewed by numerous persons before interment.

This body, the State contends, was the body of Zack Dixon.

The coroner, some of his jurors, and many of the other persons who saw the body, were examined as witnesses in this case.

The head was never found; consequently, identification of the person was rendered more than ordinarily difficult.

The State endeavored to show that the headless body was that of Zack Dixon by means of certain articles of apparel and certain flesh-marks found upon it, and also by its general appearance; and upon all these points the prisoner endeavored to meet the effort of the State by such conflicting evidence as he was able to produce.

On the dead body, when taken from the water, was found a part of a plain, hand-sewed, domestic shirt, with sleeves "hemmed back at the wristband," because too long originally; and on one arm was a "leather wristband." About the presence of these articles on the body when rescued

from the creek, and their description, all the witnesses are agreed.

Millie Suggs, mother of Zack Dixon, testified that he "had two burnt places on the shin of his leg and a scar across the instep of his foot;" that she "saw the dead body, and knew it was Zack;" that she saw upon one leg and foot the scars which she knew were upon his person at those places; that she was "positive the dead body was that of Zack Dixon," her son; and, furthermore, that she made, with her own hands, the shirt Zack had on when he left her house late in the forenoon of the day on which he was last seen alive, and knew the piece found on the dead body to be a part of that same garment; that she knew it by her "sewing, and the tuck on the wristband sleeve;" that she "made it with her fingers, and knew her sewing;" that she "turned back the wristband and hemmed it because it was too long;" that she made two shirts for him from the same piece of goods and by the same pattern. One of these garments he put on at her house in the forenoon of the day he disappeared; the other one she brought into Court for comparison with that taken from the dead body. "The sewing appeared to be the same on both," and they were alike in all respects, except the one found "on the body was a little larger in the collar," had "a little wider collar-band and plait," and was darker in color than the other one. This witness further said that she described

the scars upon her son's foot and leg and "the tuck in the sleeves" of the shirt before she saw the dead body; that the leather wristband found upon one of the arms "was the one Zack had on when he left" her house for the last time; that "where the skin was on the body found, it was same color of Zack."

S. W. Beck, with whom Zack Dixon worked in 1888, testified that Zack left his house on Saturday before the first Sunday in November of that year to visit his mother, a few miles away, and return on Sunday evening; that for some unknown reason he did not return; that he knew Zack had a scar on instep of right foot, and another one on leg, having seen them when Zack was barefooted and had his "pants rolled up;" that he saw on the dead body in question "the same kind of scars, and in the same places;" that he was "satisfied it was the body of Zack Dixon from these scars," the leather wristband, and the "size of body and color;" that "Zack cut a piece of bridle-rein off of a blind-bridle of witness for a wristband," which he thinks is the same leather wristband found on the body; that "the body found was the body of Zack Dixon."

Mattie Dixon, a sister of Zack, says he "had a scar on leg and on foot, down on front;" that he put on clean shirt, made by their mother, the morning of the first Sunday in November, 1888; that the "wristband was turned over and whipped down;" that her "mother always did the shirts

that way when they were too long;" and that she thought she had seen the shirt found on the dead body before.

J. J. McCollum, the Coroner, testifies to the finding of the two sacks, and as to their contents, as hereinbefore stated, including the piece of shirt and the leather wristband. He says also that the body was that of "a black negro" man or boy; that he saw "some patches of black skin hanging" upon it; and that he "found an indenture or scar or crease on one foot," but "did not examine foot closely."

Caleb Osborne, one of Coroner's jury, says he saw "scar on the leg" of dead body; that Zack Dixon's mother described the scars, the shirt, and the hem on wristband before she saw the dead body; that they "found the shirt as she had said," and she identified it when she saw it; that the body was that of a "black negro man or boy," but presented a "light brown color where the skin was slipped off."

Dr. George D. Butler says he examined body at request of Coroner, and found on instep of "one foot either a scar or indentation made by a rock while in the sack," but "saw no scar on leg, \* \* did not look for any;" that "it was a black negro boy;" that "water had a tendency to cause the cuticle to slip off, and the outer skin had slipped off in many places."

Tom May, of Coroner's jury, says he saw no scars, and looked for none; that the general ap-

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pearance of the body where cuticle had come off was "mulatto or yellow," but that it was "black" where no such change had taken place.

Ben Aymett says Zack had a "scar on instep and leg;" that he examined dead body, and, from its "color and size" and "scar on leg at same place," he thought it was Zack's body; that "it was a shade lighter" than Zack, but the "water had bleached it."

Dr. J. C. Roberts says he saw the body taken out of the creek; that "it was the body of a black negro;" that "the water made the body look ashy and pale somewhat."

Ed F. McKissack says the body had "black spots between the shoulders," and that "the outer skin had slipped off except in spots."

H. E. Butler says the body when taken out of the creek "was yellow," and that "Zack Dixon was black as a crow."

Dr. William Batt says "the skin of a negro consists of two main layers;" that "the coloring matter of the negro's skin is in the outer cuticle, and when that slips off it exposes the inner or true skin;" that "if a dead body be put in water for any length of time it makes the cuticle slip."

Touching the identity of the dead body, the prisoner examined six witnesses, the substance of whose evidence will next be given.

M. M. Maclin, who interred the body, says he examined it "closely for scars and found none;" that he examined both feet and legs particularly,

because he "had heard the mother of Zack say he had scars on his right leg and foot;" that "body was the color of a mulatto."

Dr. W. A. Milhouse says he made the examination with M. M. Maclin; "examined both feet and legs particularly," and "found no scars;" and that he thinks "the body was that of mulatto."

Dr. G. A. Abernathy "saw no scars on the body," but "did not examine it closely;" says he thinks "it was the body of a mulatto," and that the skin was not off; that he does not think "soaking a black negro's body in water would change it" to the appearance "of mulatto without destroying skin."

Grant Butler says he "found no scars on foot or leg," but "did not examine body very carefully," that it was of "mulatto color."

Sam Hopkins says the body was "lighter in color than Zack," but about his "size," and "of his appearance through the shoulders."

J. W. Judson says body was "bright mulatto," and "if the skin had slipped from body he did not notice it."

This evidence clearly establishes the *corpus delicti*; it leaves no room for reasonable doubt that Zack Dixon was murdered, and that the headless body found in Richland Creek was his body.

The identity is shown by the flesh-marks, the shirt, the leather wristband, and the color and size of the body.

That Zack Dixon had scars upon one foot and



leg is shown without contradiction. All the witnesses who saw these scars upon his living person, and who made examination, readily found scars of same character and location on the dead body. There were three of these witnesses—Zack's mother, Beck, and Aymett—and two other witnesses, without close examination, discovered a scar, or something like one, on one foot; and another one noticed a scar on one leg.

On the other hand, there are four witnesses who looked for scars and failed to find them. None of these, however, had seen the scars on Zack Dixon's body while living, and only two of them claim to have made a careful examination of the dead body. It is not strange that persons having seen the marks on the living body could more readily than other persons discover them upon the dead body.

The evidence about the shirt is of but little less potency. The day Zack Dixon disappeared he put on the shirt found upon the dead body, and wore it away from his mother's house. She identified the garment positively by the peculiar work of her own hands upon it, as well as by comparison with another one of the same kind and make. The peculiarity about the sleeves could not be mistaken. It was observed at once by those who saw it while on the dead body and afterward. That peculiarity she described, as she did the scars on her son, before she saw either the shirt or the dead body, and by that description one of the witnesses recog-

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nized the shirt. He says they "found the shirt as she had said," and she promptly identified it. Her identification is not discredited, nor is its force weakened, by the fact that the shirt produced in Court, as of the same goods and pattern, was whiter than that found on the dead body, and not so large in the collar. She did not claim that the collars were of precisely the same size and make. Garments made by the same pattern frequently differ in such small particulars. The difference in color is well accounted for by the fact that one had been in water on a dead body, and the other had been "washed clean."

The proof about the leather wristband is likewise of marked importance, though in a less degree than that as to the flesh-marks and the shirt. That Zack Dixon had such an article on one of his wrists the day of his disappearance is clearly shown, and his mother says the leather wristband found on the dead body is "the one Zack had on when he" left her house that day. She states no mark or peculiarity by which she recognized it. She may have been mistaken.

Beck expresses the belief that this wristband is the same that he saw Zack Dixon make from a piece of bridle-rein belonging to witness, yet he does not identify it positively.

The dead body was of proper size and color for Zack Dixon. He was black, and all the witnesses who examined the whole of the dead body say it was black. Most of the witnesses who

speaking of it, say it was of an ashy, yellow, or mulatto appearance, but this is manifestly due to the fact that the water had "bleached it," or caused the "outer cuticle to slip off" of the parts examined by them. Others state emphatically that it was black where the "skin had not slipped off."

The next question is, Did Larkin Lancaster, the prisoner at the bar, perpetrate the murder? He is a married man, and in 1888 was living with his wife and children on Pisgah Hill, in Giles County. "Mandy" Crittenden, his sister-in-law, was also a member of his family. He was very partial to her, and said many extreme things to keep other men from associating with her. Zack Dixon, though several years her junior, paid her some attention. This seems to have greatly enraged defendant, and to have caused him to make deadly threats against the life of Zack Dixon. Some two weeks before his disappearance Zack Dixon attended a party at defendant's house, "danced with Mandy" and talked with her "outside of the house." On that occasion, while under the influence of liquor, Lancaster made threats of a most serious character. To the witness, Beck, he said he "would kill that — rascal, Zack Dixon, if it was the last thing he ever did." At a later hour, the same evening, he attempted—as his father-in-law, Alex. Crittenden, testifies—to shoot Zack Dixon, and would have done so but for the timely interposition of the father-in-law. This was while "Zack was sitting outside of the house with

Mandy." Alex. Crittenden further says that when he "prevented" defendant from shooting, defendant said "this aint the last time," and that he "would drink his own heart's blood before he would let any man get in his path." He says, also, that he at another time heard defendant "tell Smith Woodson that he was going to kill Zack," and that he (witness) "advised him not to do any such thing."

Smith Woodson testifies that defendant said to him, two or three weeks before Zack Dixon's disappearance, that he "had told Zack to let Mandy alone," and that "Zack must do it," and if he did not, defendant would "kill him and put him away where he wont be found;" that in this conversation defendant said of Mandy, "she is mine."

Thus it is made to appear, without any proof to the contrary, that defendant had a strong motive to take the life of Zack Dixon. No motive to commit the crime is shown in any one else—not even a circumstance pointing to any other person as the murderer is disclosed in the record.

Walter Cross says he saw Zack Dixon at the foot of Pisgah Hill, one mile from defendant's house, and going in that direction, between sundown and dark, on the day of his disappearance; that Zack "said he would probably come to meeting after awhile," at a place of service in the neighborhood, but he did not do so.

That was the last time any of the witnesses

saw Zack Dixon alive. Where he was then going he did not state. On the following morning defendant voluntarily told W. C. Davis that Zack Dixon "had promised to come to his house the night before," but had failed to keep his promise.

At dark that night Wash Neal, in passing defendant's house, halted to inquire where "preaching was to be that night," and called defendant three times, loud enough to be heard in the house, but got no response. Prince Wilson and James Tucker say they came up while he was calling, and the three went to church together. Where defendant was at this time no witness knows. After being suspected of the murder of Zack Dixon, the defendant told James Tucker that he was in his house and heard the calling; but he assigned no reason for not answering. No witness saw him anywhere that night, nor any member of his family, except Mandy Crittenden, who was seen at church.

How he was engaged—if in his house or not, whether innocently, with none but his wife and children present; or secretly, with the dead body of Zack Dixon, already slain; or politely detaining him, with a view of accomplishing a foul purpose later on, at a more opportune hour—no witness undertakes to state, and the Court will not surmise.

Though defendant had two or three children of sufficient age to testify, he put none of them on the stand to say that Zack Dixon was not at his

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house that night, or where he himself was, or how engaged.

Three witnesses, who were at as many different places in the neighborhood, say they heard one or more reports of a gun or pistol in the direction of defendant's house about nine or ten o'clock that Sunday night. This evidence is general. The witnesses did not profess ability to locate the sound of the gun or pistol with certainty.

If Zack Dixon was killed with gun or pistol, the wound or wounds must have been inflicted upon the missing head, for none could be discovered on the parts of the body rescued from the waters of Richland Creek.

W. C. Davis says he met defendant and his son in the public road, five miles from and going toward Pulaski, and three miles from Pisgah Hill, at eight o'clock Monday morning after Zack Dixon disappeared Sunday night; that defendant asked him the time of day, and then inquired if he had seen Zack Dixon in Pulaski, saying Zack "had promised to come to his house the night before, but he did not come;" that defendant was riding on one horse, with a sack in front of him, and his boy on another horse, with another sack;" that "the sacks were full, and looked like bags of rags or cotton;" that he "saw blood dropping from under the sack, down the shoulder of the horse the boy was riding;" that one of the sacks was made of tow and the other of cotton; that he observed them with sufficient care to see that de-

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fendant "had the tow sack and the boy the cotton sack;" and, finally that they were "just like" the sacks in which the dead body was found, but he could not say that "they are the same."

Strangely, if innocent, the defendant introduces no witness to deny, explain, or in any manner break the force of these facts, strongly inculpatory as they are. Where he and his son were going that Monday morning, the character of the burdens they bore, and what they did with them, no witness is brought to state. Not even the son himself comes to declare that the trunk and limbs of Zack Dixon's dead body were not in the two sacks, and to explain or deny the dropping of blood from the sack in his charge. He, at least, knew the real facts, and could unquestionably have enlightened the Court and jury. Though living in the defendant's family and under his control, he is not introduced, and no excuse is given for his non-appearance as a witness.

That defendant was traveling upon a public highway and made no effort to avoid Davis does not, of itself, indicate innocence; nor does his voluntary reference to Zack Dixon at that time have that effect. The latter rather indicates guilt. If guilty of murder, with the body of his victim concealed before him, it was natural for him to make such inquiry and declaration as he did to avert suspicion. This record fails to disclose any other reason for mentioning Zack Dixon's name at that time.

It should be noted in passing that neither the State nor the defendant shows how far or in what direction the point at which defendant and his son met Davis is from Hicks' Bluff, near which the dead body was found.

Hutch Crittenden, a brother-in-law of defendant, testifies that defendant approached him soon after Zack Dixon's disappearance, and requested him "to say that Zack had stolen a horse and gone to Texas," and that witness "had given him two dollars to go off on." Witness says he replied that he did not let Zack have "any two dollars," and that he would not make the false statement requested.

Emily Currie says defendant went to her house the next week after Zack Dixon was missing and told her husband, in her presence, that he (defendant) was being accused of murdering Zack, and that he did not do it; that, upon being asked where Zack was, defendant said he had stolen a horse, and gotten two dollars from Hutch Crittenden and gone off to Texas; that defendant then told her husband in her hearing to circulate that story if any one inquired of him about Zack; that defendant got angry, swore, and denounced Hutch Crittenden as a falsifier when witness told him Hutch Crittenden denied letting Zack Dixon have any money.

Smith Woodson says defendant told him Zack Dixon had gotten "into a pistol case and ran away," as he had been informed by Hutch Crittenden.



James Tucker, one of the witnesses who passed defendant's house and heard Wash Neal calling him the night of Zack's disappearance, says defendant told him, about a week after that time, that "he expected they would have him [defendant] up about Zack Dixon," and that he wanted witness "to stick to him;" and that defendant further said he was at home lying on the bed the night "Wash Neal called him, and heard every word that was said."

In fact, there were no charges against Zack Dixon. He had violated no law, and had no reason to flee the country, so far as can be seen from this record. The stories which defendant endeavored so anxiously and boldly to put in circulation were but the productions of his own brain. They had no foundation in fact.

Though no witness saw Larkin Lancaster take the life of Zack Dixon, the many circumstances detailed establish the fact as conclusively as if sworn to by credible eye-witnesses. They exclude every other reasonable hypothesis. Strong motive, deadly threats, favorable opportunity, strange secrecy about the premises, bold efforts to fabricate exculpatory evidence, unexplained possession of burdens corresponding in appearance with sacks known to contain parts of the dead body—all these concur.

As to the venue, but little need be said. Exactly where the murder was committed no witness knows, but the proof is that the place at which

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Zack Dixon was last seen alive and Pisgah Hill, where defendant lived, and the public road, where Davis met defendant, and Hick's Bluff, on Richland Creek, where the dead body was found, are all in Giles County. This is sufficient.

The charge to the jury was full, clear, explicit, and accurate in all of its parts. On the most vital point in the case the Court said to the jury: "In order to warrant you in convicting the defendant in this case, the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt, for, before you can infer his guilt from circumstantial evidence, the existence of circumstances tending to show his guilt must be incompatible and inconsistent with any other reasonable hypothesis than that of his guilt."

All rulings as to evidence were correctly made.

It is assigned as error that the trial jury was not properly sworn. The position is not well taken. After reciting that defendant was "arraigned and charged upon the indictment in this case, and that he pleads not guilty thereto," the record states that the jurors were "elected, tried, and sworn well and truly to try the issues joined." Though omitting the words "and true deliverance make," and some other words of the common law form, the oath thus shown to have been administered is entirely sufficient. Language of precisely the same legal import has, more than once, been

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held by this Court to meet the requirements of the law. *Fitzhugh v. The State*, 13 Lea, 260; *Baxter v. The State*, 15 Lea, 657.

It was not decided in *Hargrove v. The State*, 13 Lea, 179, as insisted by counsel, that such an oath was insufficient. It was only said in that case that "if" an oath in like words "was defective," the defect was cured by a fuller statement of the oath in the minute entry containing the verdict.

It is also urged that the oath administered to the officers attending the trial jury was not a legal oath. The record recites that they were "sworn as required by law in such cases." Manifestly that recitation was sufficient. If they were "sworn as required by law," nothing more was essential. It was not necessary that the oath taken by such officers should be set out on the record. The bare statement that they were "sworn as required by law," or "according to law," is enough. *Taylor v. The State*, 6 Lea, 235.

The law prescribes a certain oath, and if the oath administered is set out on the record, to be good it must show all the requisites. *Buxton v. The State*, 5 Pickle, 216.

The recital, in subsequent entries in the case at bar, that the jury returned into Court "under charge of the same two officers heretofore sworn to *keep them*," cannot justly be termed a statement of the oath really taken. The words, "*to keep them*," were not used for such a purpose. The

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object of these later entries was to identify the officers in charge of the jury, and not to set out the oath administered to them.

Finally, it is contended that a new trial should be awarded on account of matters set out in defendant's affidavit seeking that relief below.

The verdict returned was as follows: "We, the jury, find the defendant guilty of murder in the first degree, with mitigating circumstances."

The substance of the affidavit is, that upon retiring to consider of their verdict, some of the jurors were opposed to conviction because not satisfied of defendant's guilt, and they finally consented to a verdict of guilty only because they were, by the other jurors and the presiding Judge, "induced to believe" that under a verdict in the form rendered "the Court could adjudge a punishment short of death;" that affiant "is informed and believes that the verdict \* \* was so rendered because the jury had a doubt of defendant's guilt, and not because there were any mitigating circumstances;" that "affiant has tried to get some of said jury to make an affidavit, but they refused to do so," on account of which refusal he "asks the Court to call around the members of said jury and interrogate them as to the facts herein stated," affiant being "unable to get the true facts before the Court in any other way."

On presenting that affidavit defendant's attorney moved the Court to examine the jurors touching the matters therein stated. This the Court refused

to do, on the ground that the jurors had refused to make affidavits and seemed satisfied with their verdict.

The entry on the record further recites that "the only foundation for the statement in defendant's affidavit to the effect that some of the 'jurors would not consent to such a verdict until some of their number went to see the Judge, and returning stated such could be done,' was this: Said jury, shortly [before] returning their verdict, came into open Court, in a body, in charge of their officers, and one of said jurors asked the Court if in this kind of a case they could find 'mitigating circumstances;' the Court replied: 'Yes, you will find this matter in the written charge which you have;' whereupon the jury retired and in a short time returned their verdict."

The action of the trial Judge was right in both respects—in refusing a new trial upon the unsupported affidavit of defendant, and in declining to have the jurors examined about their verdict.

Conceding the truthfulness of the claim that some of the jurors would not have agreed to the verdict but for their belief that "the Court could adjudge a punishment short of death," that constitutes no ground for a new trial. The legal proposition which it is said "they were induced to believe," was entirely sound; the Court had the power supposed. Code (M. & V.), § 6098.

The other suggestion, that the "jury had a doubt of the defendant's guilt," is contradicted by

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and inconsistent with the verdict, whose verity cannot be questioned in the mode adopted.

As the jurors declined to make affidavits, and in no manner indicated any dissatisfaction with their verdict, the Court did right in refusing to have them examined on the unsupported affidavit of the defendant.

Such a practice as that sought to be introduced would, to say the least, result in interminable confusion and disorder not to be sanctioned for a moment. *Hannum v. State*, 6 Pickle, 647.

The case at bar is not analogous to that of *Nelson v. State*, 10 Hum., 532-534. There it was made manifest to this Court that the jury "were laboring under erroneous impressions as to the law of the case before them." It is not so here, for, by defendant's own statement, they correctly understood the law as to the legal effect of their verdict in the form rendered. There they returned a verdict unauthorized by law, and that under such circumstances as to indicate confusion in their minds; not so here. Besides, in that case, five of the jurors made affidavits showing unquestionably that they had been misled, without fault on their part. Here no juror makes an affidavit, and there is no indication that any of them were misled in any way.

Any assumption of defendant that some of them may have been misled by the Court with reference to the form of the verdict is refuted by the recital quoted from the record.

After properly overruling motions for a new trial and in arrest of judgment, the trial Judge pronounced sentence of death upon the defendant, notwithstanding the finding of mitigating circumstances by the jury. He was authorized to do that, or to commute the punishment from death to imprisonment for life, as in his sound discretion, and upon an unbiased and discriminating survey of the whole case, the ends of public justice might seem to demand. Code (M. & V.), § 6098; *Greer v. The State*, 3 Bax., 322; *Lewis v. The State*, 3 Head, 127 and 150.

There was no abuse of that discretion in this case; no mitigating circumstances are disclosed in the record before us. In Lewis' case, as in this, the trial Judge declined the commutation.

Let the judgment be affirmed.

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Turnpike Co. v. Davidson County.

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## TURNPIKE CO. v. DAVIDSON COUNTY.

(Nashville. March 1, 1892.)

1. TURNPIKE COMPANIES. *Charter rights of, not violated by creation of new roads and bridges, when.*

The obligation of the charter contract, whereby a turnpike company is authorized to exact tolls from persons passing over its road and through its gates, is not impaired or violated, within the prohibition of the constitution, by the action of the County Court creating new public roads and bridges, the necessary effect of which is to divert travel from the turnpike and seriously reduce the company's revenues, provided the new roads and bridges are not, in intent and effect, mere shun-pikes, but reasonably essential to the public convenience; and, provided further, they are not located within territorial limits exclusively devoted to the turnpike company by a reasonable and valid provision of its charter.

Constitution construed: Art. I., § 20.

2. SAME. *Impairment of franchises by lawful creation of new roads and bridges not a taking of property.*

And the impairment of a turnpike company's franchises and revenues by such lawful creation of public roads and bridges does not constitute such taking of its property for public uses as will render the county liable for damages thus inflicted.

Constitution construed: Art. I., § 21.

Cases cited and approved: Turnpike Co. v. Maury County, 8 Hum., 342; Moses v. Sanford, 11 Lea, 731; Levisay v. Delp, 9 Bax., 415; 11 Pet., 548; 1 Black, 380; 3 Wall., 75, 210; 15 Wall., 512.

3. SAME. *Necessary public roads are not shun-pikes.*

Public roads and bridges demanded by the general convenience, and created to subserve that end, are not shun-pikes, although they may



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incidentally afford the means of passing around the gates of a turnpike company and evading the payment of tolls.

Cases cited: Nashville Bridge Co. v. Shelby, 10 Yer., 280; Turnpike Co. v. Maury County, 8 Hum., 350.

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FROM DAVIDSON.

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Appeal from the Chancery Court of Davidson County. ANDREW ALLISON, Ch.

DEMOSS & MALONE for Turnpike Co.

ANDREW J. CALDWELL and EAST & Fogg for Davidson County.

LEA, J. The city of Nashville is located upon the south bank of the Cumberland River, and within the bend of the river. From the opposite side the city is approached by two turnpikes which operated ferries across the river. The complainant company crossed the river about three miles below the city, and the other nearer the center of the bend. The complainant company had its toll-gate for a number of years at a point about two miles from Nashville, but in 1877 moved the same to the river, and there collected toll and ferriage at the same place.

In 1885 the citizens living in certain districts of the county across the river petitioned the

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County Court to erect a bridge over Cumberland River, setting forth the growing necessity for the accommodation of that community, and that in high water the turnpikes could not be traveled; that the boats at the ferries did not run in high waters, and at no time after sundown. Committees were appointed to petition the County Court, and represent the necessity of the bridge. Committees were appointed by the Court to investigate and report. Authority was obtained from Congress to erect a bridge over the river. Finally, the county determined to build the bridge, and appointed a committee to locate it and superintend its construction, and appropriated for its erection \$100,000. It was located about two-thirds of a mile above the ferry of complainant. It was commenced in 1887, and finished in 1889, costing the county about \$124,000, including the approaches, when completed. The approach to the bridge on the north side was extended through the bottom up to complainant's road, intersecting it about one mile from the bridge. On the south side the Court opened and ordered opened a road, extending about one mile to the Jewish Cemetery, toward Nashville. The natural result of opening this free bridge was to divert travel from complainant's turnpike.

Thereupon, this bill was filed by complainant, alleging that by such action of the county it had lost almost its entire revenues which it was entitled to collect as tolls; that its chartered privi-

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leges were not only impaired, but destroyed, and its road virtually confiscated by the county without any compensation. It further alleged that the approach to the bridge on the north side of the river and the parallel road ordered to be opened on the south side were intended to be used by the promoters of the new bridge and the roads as a shun-pike, and preliminary injunction was prayed for and refused by the Chancellor. The allegation of the bill as to the intention to cause shun-pikes was denied in the answer, and it is alleged that the public convenience required the building of the bridge and the approaches thereto.

The proof in this cause conclusively establishes the statement of the answer that the people in the localities reached by complainant's road had for many years greatly needed an outlet to the city and other portions of the county, and especially the twenty-third, twenty-fourth, and twenty-fifth civil districts of the county; that they were practically cut off during high water, and could not at any time cross the river after sundown, and were practically cut off from market. This turnpike run from Nashville to Ashland City, in Cheatham County. It was chartered in 1848. The charter is in the ordinary form of turnpike companies. The grant of franchise is not exclusive. When the grant is not by its express terms exclusive, it cannot be held to be so by implication. 11 Pet., 548. In that case it was said:

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“The continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the end of its creation—the functions it was designed to perform transferred to the hands of privileged corporations;” and in that case the United States Supreme Court determined that where a charter for a bridge company does not contain any express contract, that the State would not authorize another bridge to be built to the injury of the corporation—a law empowering another corporation to erect a free bridge so near to the first bridge as practically to deprive the first corporation of all tolls, is not a law impairing the obligation of any contract.

The principle was settled by this case, and followed in numerous decisions, that when the grant is not by its terms exclusive, the Legislature is not precluded from granting a similar freedom of erecting a rival way or structure, the result of which may be to greatly impair, or even totally destroy, the value of the former grant, and such damage is not a *taking* of the former franchise which entitles its owner to compensation. Lewis on Eminent Domain, 136 and cases cited; 1 Black, 380; 3 Wall., 75-210; 15 Wall., 512; 8 Hum., 342; 11 Lea, 731; 9 Bax., 415.

If any *property* of complainant is taken, compensation must be made, but only for the property actually taken and the damages incidental to the property; but the loss incident to or in deprecia-

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tion of the franchise is not to be considered.<sup>3</sup> *Moses v. Sanford*, 11 Lea, 731; Lewis on Eminent Domain, 484.

The right to take toll for travel over their road is not impaired or interfered with, and no part of their road is used as a part of the roads opened by the county, but it is insisted that there was a *taking*, in the fact that the road on the north side leading from the bridge runs into complainant's road, occupies its ditches, and physically touches the pike. Its easement is simply, without forfeiture, made to contribute to a great public convenience in affording an outlet to the bridge; no franchise is taken away, and its right of way is uninjured, and no compensation can be demanded, for it is not a taking. But it is insisted that the building of this bridge and approaches may not be the impairing of a contract in the absence of such contract in the charter, yet it is in violation of constitutional right to permit the County Court to construct a new road in the same territory around complainant's toll-gate and ferry, and in doing so to intersect on the north of the river with the turnpike, and on the south so extending the road from the end of the bridge as to intersect with roads leading to the turnpike and intersecting same between the gate and the city; that such is the practical result, and was deliberately intended to be, by the promoters of the new bridge road, a shun-pike.

More than once the question of shun-pikes has

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been before this Court. In the case of the *Nashville Bridge Company v. Shelby*, 10 Yer., 280, it arose under an application of a party who owned the banks on both sides of the river for leave to establish a ferry in competition with the bridge located upon contiguous territory. Judge Reese said the petition was properly refused, and that "the only question for the County Court to determine was whether public convenience made it proper to grant the prayer of the petition."

The case of *Turnpike Company v. Maury*, 8 Hum., 350, was an application by the turnpike company to enjoin the county from maintaining as a public road a by-way which it constructed from a point on complainant's road between the first toll-gate and Columbia, close to the gate, around the gate, re-entering the pike on the opposite side of the gate, not far from it, and by which the rights of the company would have been seriously impaired.

The Court held that, as the manifest purpose and necessary result was to establish a shun-pike, and as it appeared the turnpike was a better and shorter road than the county road which took from the company substantial profits, there was consequently no demand for the road as a public convenience; and the action of the County Court was held to be an abuse of its powers. Judge Turley qualifies the whole of his opinion by this: "It is not meant that the Legislature may not charter other public roads for public convenience,

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a necessary but indirect consequence of which may be a diminution of travel; but that no such charter could be granted, the only end and purpose of which would be to evade the payment of tolls."

But it is earnestly insisted that the County Court has opened a road from the south end of the bridge to an old county road known as Beck's Spring Avenue, and this avenue intersects the pike between Tritchler's corner and the ferry, and complainant has been advised by counsel that a gate could be re-established at Tritchler's corner and collect toll of persons traveling to and from the free bridge, but the county has ordered to be opened a road from the point where the bridge road intersects Beck's Spring Avenue to the Jewish Cemetery, which will there intersect with roads leading to the pike south of and between Tritchler's corner and the city, and that said road about to be opened is not for the public convenience, but is a shun-pike. In answer it is only necessary to say that there is no gate at Tritchler's corner. As before stated, the gate was removed from there about fifteen years ago, and whether after such abandonment it could be re-established, it is unnecessary to now determine. There is no gate there, and therefore can be no shun-pike.

From the decisions of the Supreme Court of the United States, and our own Court, the following principles are deducible:

*First.*—The grant of a franchise may be exclusive, or it may be silent in that respect. A toll-

bridge or ferry, or other franchise is often granted with a provision that no other competing bridge, ferry, or turnpike shall be erected within a certain distance above or below the one granted, and this exclusiveness may be limited or unlimited in its duration.

*Second.*—When the grant is not by its terms exclusive, no presumptions or implications will supply the omissions in the grant, and the Legislature is not precluded from granting a similar freedom of erecting a rival way or structure, the result of which may be to greatly impair or even totally destroy the value of a former grant, and such damage is not a *taking* of the former franchise which entitles its owner to compensation.

*Third.*—If any *property* is taken, compensation must be paid, but only for the property actually taken and the damages incidental to the property, but the loss incident to or depreciation of the profits of the franchises is not to be considered.

*Fourth.*—In this State the County Courts are clothed with the powers and duties of laying out and maintaining public roads and highways for the convenience of the general public.

*Fifth.*—That a road cannot be built only for *the purpose and intent* of evading the payment of toll upon a turnpike.

*Sixth.*—That the County Court may erect or open a road when the same is required by *public convenience* or *necessity*, even though the effect of the same is to diminish or destroy the value of a



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franchise formerly granted to a bridge, ferry, or turnpike.

Applying these principles to the facts proven in this case, the decree of the Chancellor dismissing complainant's bill is affirmed with costs.

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Bank v. Dibrell.

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## BANK v. DIBRELL.

(Nashville. March 3, 1892.)

1. NEGOTIABLE INSTRUMENTS. *Notice of non-payment ineffectual, when.*

Notice to indorser of demand and non-payment of a negotiable note is insufficient, though duly sent by the notary and received by the indorser through the mails, if the notice is unsigned.

Cases cited and approved: 16 Cal., 375; 10 Mass., 522.

2. SAME. *Indorser's waiver of notice of demand and non-payment.*

But if the indorser, with full knowledge that such notice is defective and insufficient to bind him, promised to pay the note in consideration of indulgence granted, this is a waiver of all defects in the notice.

3. SAME. *Same. Averments in pleadings.*

And such waiver of notice may be proved under an averment that notice was given. A count upon the new promise is not essential.

Case cited and approved: Bogart v. McClung, 11 Heis., 117.

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FROM WHITE.

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Appeal in error from Circuit Court of White  
County. W. M. HAMMOCK, J.

W. T. MURRAY for Bank.

W. G. SMITH & SON for Dibrell.

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Bank v. Dibrell.

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LURTON, J. This is an action against an indorser upon a note payable to and at People's National Bank, McMinnville.

The notice of demand and non-payment sent by the Notary Public to the indorser was, in form, proper. It was signed, however, by no one. This was probably inadvertent. It was, for this defect, insufficient as notice. The notice of non-payment, and that the holder will look to the indorser, must be given by the holder, his agent or attorney. An unsigned notice sent by mail is not a notice by the holder or his agent. This was so ruled in 16 Cal., 375. A notice signed by the Notary, by mistake in the name of the maker, was held bad. 10 Mass., 522.

Upon receipt of this unsigned notice the indorser consulted counsel as to its sufficiency, and was advised that the notice was bad. After this, and with full knowledge of his discharge, he unequivocally promised to pay the note, and obtained indulgence. Such a promise, after knowledge of his discharge, is an admission of notice—an admission of the sufficiency of the notice he had received; and a declaration alleging that notice had been given is sufficient to let in evidence of such a promise; and an allegation that he had made such promise, or a count upon a new promise, is not necessary. *Bogart v. McClung*, 11 Heis., 117.

There is no error in the judgment, and it is affirmed.

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Nance v. Busby.

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## NANCE v. BUSBY.

(Nashville. March 5, 1892.)

1. RELIGIOUS SOCIETIES. *Capacity of unincorporated to hold lands.*

A deed is not void upon the ground that the vendee is an unincorporated religious association which conveys a church lot to "the Regular Primitive Baptist Church, at Nashville, of the old school, and of which Elder Philip Ball is the present pastor or minister, and their successors of same faith and order forever." By statute such associations, whether incorporated or unincorporated, are empowered to take and hold "not exceeding five acres of land at one place for purposes of public worship." (*Post*, pp. 305, 314.)

Code construed: § 2006 (M. & V.); § 1508 (T. & S.). (See Acts 1889, Ch. 11, as to parsonages.)

Cases cited and approved: *Reeves v. Reeves*, 5 Lea, 644; *Heiskell v. Chickasaw Lodge*, 87 Tenn., 668; 2 Pet., 566; 8 B. Mon., 78.

2. SAME. *Same. Construction and effect of deed.*

And this deed created a trust in the property conveyed for the benefit of such persons only as were or should become members of the particular association named as vendee. The interest of the beneficiaries under this deed is dependent upon membership in the association, and is of such character that it begins and ends with membership. This deed created a trust so specific and definite that the Courts will interfere to prevent the diversion of the property from the use of the particular "faith and order" named, and this intervention may be invoked by a faithful minority against a heretical majority. (*Post*, pp. 313-315.)

Cases cited and approved; *Bridges v. Wilson*, 11 Heis., 458; *Deadrick v. Lampson*, 11 Heis., 523; 2 Bligh, 529; 1 Dow., 1; 3 Merivale, 353; 13 Wall., 680; 67 Penn. St. —; 3 B. Mon., 258; 7 Dana, 190; 2 Pet., 585.

3. SAME. *Status of excommunicated and withdrawn members.*

After a member has voluntarily withdrawn, or has been expelled from such association, he ceases to have any right or interest in its property,

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and he cannot thereafter maintain suit for himself, or for himself and existing members of the association in sympathy with him, against other members of the association complaining of diversion of its property. Persons withdrawn or expelled from membership are not of same class with actual members, although they may be in sympathy with each other. (*Post*, pp. 315-317.)

4. SAME. *Validity of excommunication of members.*

The excommunication of members by an unincorporated religious association, done in the exercise of its powers of discipline, is valid and effectual, when questioned in the civil Courts, to exclude the excommunicated ones from membership in the association, and consequently from any right to its property. And it is not material that the proceedings were irregular, and the expulsion made without giving notice or opportunity of hearing to the excluded members, the proceedings are nevertheless conclusive upon the Courts. (*Post*, pp. 317-324.)

5. SAME. *Same.*

And excommunication of members by such association is not vitiated by the fact that its members, or a majority of them, subsequently departed from the "faith and order" of their particular denomination. It would be otherwise if they had done so before, and had resorted to excommunication of some members as part of a scheme to divert the property of the association from its original purposes. (*Post*, pp. 317, 318.)

6. SAME. *Same.*

And such excommunication is not vitiated by the fact that under the organization of the particular church or association the excluded members had no appeal from their sentences. (*Post*, pp. 335, 336.)

7. COURTS. *Jurisdiction of ecclesiastical questions.*

The civil Courts have no jurisdiction of any purely ecclesiastical question except as an incident to the determination of civil rights. Hence, they will not review the action of an ecclesiastical body in disciplining its members, however irregular or unjust that action may appear to be. They will, however, determine whether persons claiming property given in trust for a religious society of a certain "faith and order" are of the required "faith and order." They will not in-

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quire as to the sincerity with which a religious creed is professed.  
(*Post*, pp. 325-330.)

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FROM DAVIDSON.

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Appeal from Chancery Court of Davidson County.  
ANDREW ALLISON, Ch.

STEGER, WASHINGTON & JACKSON, MORTON B. HOW-  
ELL, and EAST & FOGG for Nance.

PITTS & MEEKS, W. G. BRIEN, and H. H. BARR  
for Busby.

LURTON, J. The case arising upon the record may be briefly summarized as a conflict over the possession of church-property between two opposing parties in a congregation of the regular Primitive Baptist Church.

The property in question was conveyed, in 1858, by deed of Thomas Farrel, to an unincorporated religious society, described in the deed as "The Regular Primitive Baptist Church, at Nashville, of the old school, and of which Elder Philip Ball is the present pastor or minister, and their successors of same faith and order forever."

Upon this lot, by the contributions of the con-

gregation, a valuable church has been erected, which has since been continuously occupied as a place of worship by a congregation composed of those now arrayed in hostile controversy.

The complainants are W. L. Nance, C. W. Nance, S. J. Underwood, J. M. Corbett, and W. H. B. Clements, who sue "for themselves and for those who are members of the old Regular Primitive Baptist Church, at Nashville, of the old school, of which Elder Philip Ball was pastor, and being of the same faith and order."

The defendants are P. R. Busby, A. G. Byron, S. M. Dickens, W. W. Thompson, and W. G. Gilliam, "and all those who associate themselves with said persons in doing the things of which this bill complains, and who belong to the same class with them."

The defendants named answer for themselves and their associates, who they assert comprise the members and congregation of the "faith and order" of the one to whose use the property was conveyed.

Complainants allege that they, with their associates, constitute the only adherents of the principles professed and practiced by the original beneficiaries in the deed, and, as such, are the true successors "in faith and order" of the original congregation over which Elder Ball was pastor. They say that, though they constitute the congregation entitled to the sole use of the church-property, they have been, by the defendants, forcibly

and illegally prevented from enjoying, using, and controlling the property in which they have the entire beneficial interest. They charge that the defendants, who are in possession, have abandoned the original faith and order of the Church—that professed by the original beneficiaries under the deed—and have thereby lost all right to use and occupy the church, and do not constitute the beneficiaries thereunder, not being the “successors in faith and order” referred to in said deed.

In substance, they contend that the further use of this property by the defendants would be a diversion of the property to uses other than those intended by the founders of the trust and grantors in the deed. While complainants claim to be members of the congregation entitled to the use of this church, yet it is stated in their bill very explicitly that some of them have been excommunicated, and it is fairly inferable that all, though at one time recognized as members, have, at various times shortly antecedent to this litigation, been likewise excluded. These excommunications, they allege, were irregular and void, and constitute part of a scheme by which defendants sought to obtain control of the church.

The specific facts upon which the charge of unorthodoxy is predicated are these:

*First.*—That defendants have abandoned the celebration of the Lord’s-supper.

*Second.*—That they have ceased to observe the ordinance of the washing of feet.



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*Third.*—That they have set themselves up as an oligarchy, by proposing and attempting to eject, summarily and without trial, those who protest against their errors.

*Fourth.*—That they have incorporated their church, thereby “uniting Church and State.”

*Fifth.*—That in this charter they have declared that one of their objects was “to maintain all missionary undertakings,” it being, as the bill states, “one of the cardinal tenets of the Primitive Baptist Church, through which it is based upon the plain word of God, and by which it is especially distinguished from all other Christian denominations, \* \* \* that missionary undertakings are not permitted, and are therefore forbidden by the Holy Scriptures.”

The defendants answer under oath. They deny that complainants are members of the congregation; they explicitly assert that each and every one of those named as a complainant has been excommunicated and cut off from membership for disorderly conduct and contempt of the church; they say that they now, and always have, steadily held the doctrine, ordinances, and discipline of the regular Primitive Baptist Church, without any deviation or change “from the days of Philip Ball;” they deny that they have abandoned, suspended, or questioned the ordinances of the Lord’s supper and the washing of feet.

As to the circumstances under which a corporation was organized to hold their church-property,

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they say: That after the withdrawal of the church from the two Nances that they were informed that an attack was to be made upon their title to their church; that they learned that the deed had not been made to trustees, but to an unincorporated congregation; that they consulted counsel, who advised that to save their property from recovery by the grantor, or his heirs or assigns, it would be necessary to incorporate their church; that the church, in a business meeting, instructed the deacons to procure a religious incorporation; that the matter was intrusted to counsel, who filled up one of the formal applications required by the general law. The provision appropriate to a corporation for purposes other than profit turned out to contain a declaration of purposes, one of which, taken from the statute, is "the maintenance of all missionary undertakings." They say that this application was signed by the committee in haste, and without knowing that these objectionable words were embraced; that this objection was not discovered until complainant's bill called attention to it, when the church, in conference, repudiated the same unanimously, and spread their action upon their minutes, with the history of the oversight. Defendants join in agreeing that missionary enterprises, as fostered by other churches, ought not to be encouraged or countenanced. Upon the pleadings no differences of opinion seem to exist as to the principle tenets held by the opposing parties to this unfortunate controversy. The sincerity with

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which defendants have, and do now hold, the religious views they avow in their answer, cannot be doubted. Certainly no civil Court will undertake to determine the sincerity with which a religious creed is professed. When two factions in the same congregation disagree as to which is entitled to the control of the church-property, and both sides profess adherence to the same faith and practices, the right must depend upon the will of the majority, unless there be shown some law, regulation, rule, or practice of the church determining otherwise. *Hadden et al. v. Charn et al.*, 8 B. Monroe, 76.

The questions seemingly open are these:

*First.*—The ecclesiastical consequences of the fact of incorporation.

*Second.*—The ecclesiastical effect of the declaration in the charter of a purpose to maintain missionary undertakings.

*Third.*—The ecclesiastical effect of the fact, if it shall turn out on the evidence to be a fact, that the ordinances of the Lord's-supper and washing of feet have not been observed by defendants, when such failure to observe them is not the result of any change of opinion as to their efficacy or the duty of observing them.

*Fourth.*—The validity of the excommunications of complainants.

A jury was called, and under direction of the Chancellor the following issues, among others deemed wholly immaterial, were submitted:

*First.*—"Before the expulsion, or alleged expulsion of complainants, how many persons were members of said Primitive Baptist Church, and, of such persons, how many were adhering to and represented by complainants, and how many were adhering to and represented by defendants at the commencement of this suit?"

To this the jury responded: "About one hundred and thirty; and about thirty were represented by complainants, and about ninety were represented by defendants."

*Second.*—When the bill was filed in this case, November 10, 1888, were defendants and their associates the successors of the same faith and order of the regular Primitive Baptist Church at Nashville, of the old school, of which Elder Philip Ball was pastor March 28, 1850?"

To this the jury answered "No."

*Third.*—"If defendants have departed from that faith and order, how and when was it done?"

To this the jury responded: "By taking out charter September 12, 1888."

*Fourth.*—"Were complainants and their associates expelled from said church in accordance with its usages and practices or the law of the land, and, if not, then in what way were their usages and practices, or the law of the land, violated?"

To this the answer was: "They were not. By excluding them without notice or opportunity to defend themselves according to the usages and practices of the Primitive Baptist Church, of

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Nashville, of which Philip Ball was pastor in 1850."

The decree based upon the facts thus determined recites:

"*First.*—The Court is of opinion, and so decrees, that the *force and effect of verdicts* of juries heretofore entered are that complainants, W. L. Nance and associates in this litigation, are the regular Primitive Baptist Church, at Nashville, of the old school, of which Elder Philip Ball was pastor on March 28, 1850, and are the regular successors of the same faith and order of said church, and have not been expelled from said church, or ceased to be members of said body.

"*Second.*—The Court further finds and decrees that the *force and effect of said verdicts* are that P. R. Busby, A. G. Byron, S. M. Dickens, B. W. Thompson, W. G. Gilliam, and their associates in this litigation, are not the successors of the same faith and order of that regular Primitive Baptist Church, at Nashville, of the old school, of which Elder Philip Ball was pastor March 28, 1850."

To carry out this decree a writ of possession was ordered to issue to eject the defendants and place the complainants in peaceable possession.

The questions arising upon the errors assigned by defendants are of deep interest, and have received very deliberate consideration.

The effect of this decree is to eject from this church a very large majority of its members, and turn its property over to a minority who in the

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judgment of the Chancellor constitute the faithful remnant.

The jurisdiction of a civil Court to adjudge any ecclesiastical matter must result as a mere incident to the determination of some property right. Thus, where property has been conveyed to some religious use, and that use is express and specific, and has been indicated by the donor and is set out in the conveyance, a trust arises, and a Court of Equity will, upon application of the beneficiaries, as it would in case of any other sort of valid trust, prevent any diversion of such property to any other than the purposes of the founders of the trust. In the case of a definite trust for the maintenance of a particular faith or form of worship, the Court will even go so far as to prevent the diversion of the property by the action of a majority of the beneficiaries; and, if there be a minority who adhere to the original principles, such minority will be held to comprise the exclusive beneficiaries, and entitled to the control and enjoyment of the property without interference by the unfaithful majority. These principles seem to be well settled in this country as well as in Great Britain, and upon this legal ground the decree of the Chancellor rests. *Craigdallie v. Aikman*, 2 Bligh, 529, and 1 Dow., 1; *Attorney-general v. Pearson*, 3 Merivale, 353; *Watson v. Jones*, 13 Wall., 680; *Schnorr's Appeal*, 67 Penn. St. Our own cases of *Bridges v. Wilson*, 11 Heis., 458, and *Deuderick v. Lampson*, 11 Heis., 523, are in harmony.

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The conveyance under which this property is held is so specific and definite as to the "faith and order" of the conveyees as to prevent its diversion to the use of any other than a congregation of Christians of the particular sect and holding the particular views entertained by the original beneficiaries.

That it was an unincorporated society at the time of the grant does not operate to defeat it. The fact that no conveyee was in existence answering the specific designation of the grantee named in the deed, is obviated by our Act of 1843-44, carried into the Code as § 1508. This Act empowered "any religious denomination, whether incorporated or not, to take by deed or otherwise, and hold, not exceeding five acres of land at one place, for purposes of public worship." This Act was construed as creating a *quasi corporation*, and a devise to just such a religious congregation was supported. *Reeves v. Reeves*, 5 Lea, 644.

An Act of the same character, concerning subordinate lodges of Odd Fellows, was similarly construed in *Heiskell v. Chickasaw Lodge*, 87 Tenn., 668. Upon somewhat the same ground a Maryland statute of same character was held sufficient to save a gift of property to the German Lutheran Church. *Beaty v. Kurtz et al.*, 2 Peters, 212. See also *Town of Pamlett v. Clarke*, 9 Cranch, 292, and *Hadden v. Charn*, 8 B. Monroe, 78.

The beneficiaries under this deed are all such persons as are members of the congregation an-

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swering the description therein. The interest of all such members, while not a pecuniary one, is yet such a direct interest in the property so devoted to a pious use as to entitle them to apply to a Court of Equity to prevent its diversion. With membership this beneficial interest arises, and upon a continuance of membership this interest depends. When membership ceases the beneficial interest in the property terminates. Said the Kentucky Supreme Court: "It is only as a constituent element of the aggregated body or church that any person can acquire or hold, as a *cestui que trust*, any interest in the property thus dedicated to that church." 3 B. Monroe, 258; *Curd v. Wallace*, 7 Dana, 190; *Hadden v. Charn*, *supra*.

When many persons constitute a voluntary society, a few may sue in behalf of the whole. Or, if such an association be divided, and each claims exclusive use of common property, a few may sue in behalf of all who stand on the same side, and a few may defend for the class who resist such claims. This is a plain principle of equity pleading. *Beaty v. Kurtz*, 2 Peters, 585, and authorities cited therein. But in order that a few may sue in behalf of a larger number, those who sue must have a like interest with those they assume to represent. They must stand upon a plane common to the whole class. *Ib.* Is this the case with complainants and their associates whom they claim to represent?

Aside from the effect of the pleadings and issues,



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the evidence establishes that three of complainants were in fact separately excluded, and upon different occasions, and that another voluntarily withdrew from membership. There is no evidence as to the exclusion or withdrawal of the other. This status is settled by the evidential effect of the sworn answer denying his membership and asserting his expulsion.

There may be persons associated with them in sympathy and interest who are not expelled members of this church, but if this be so, complainants cannot stand for or represent such persons unless the action of the church in the exercise of its power of discipline shall turn out to be a nullity, which this Court may disregard and reverse as the Chancellor did.

Excommunicated members, whose names have been by the valid action of the church expunged from the roll of members, cannot stand for and represent members. They are not of the same class. Has this Court the power and jurisdiction to inquire into the regularity of the sentence of the church by which complainants were excluded? Unless it has this jurisdiction, and shall in its exercise determine that this excommunication was illegal, complainants have no such interest in the property of this church as will enable them to question the orthodoxy of defendants, or their right to the use and enjoyment of the property of this congregation. A different question would be presented if it appeared that *before* such sentence of

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excommunication the majority had abandoned the faith and practice of the original beneficiaries, and that they had been cut off for adherence to the old ways by such majority, as a mere scheme to better enable them to misapply the property. Such a charge was intimated in the bill. But the verdict of the jury sets at rest every suggestion of heresy or departure from the "faith and order" of the original organism antecedent to the acts of expulsion complained of. If the defendants have ceased to be of the "faith and order" of the regular Primitive Baptist Church, it was by the taking out of the charter on September 12, 1888, a fact subsequent to the acts of excommunication.

The learned Chancellor was of opinion, and so instructed the jury, that the merits of these acts of excommunication could not be inquired into. To this we certainly agree. But he was of opinion that the jurisdiction of the church to pronounce these sentences might be inquired into. He instructed the jury that all such exclusions must be in accordance both with the usages of the church and the law of the land. He left the jury to grope amidst volumes of evidence as to the usage of this church, and discover, as best they could, the ecclesiastical law bearing on the question, but instructed them that excommunication from the church would be valid only when in pursuance of the usage of the church and the law of the land. As to the law of the land, he said to the jury:

"In this State this church, nor any number of

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its members calling themselves the church, had any right to expel or exclude C. W. Nance or W. L. Nance, or any of their adherents, without first notifying them, him, or her of the time of trial and of the charges upon which the trial was to be had, so as to give them an opportunity to be heard by himself and his witnesses before judgment."

How far this charge affected the result in this case is not clear. This church is an independent congregational church. Discipline is administered by the body of the congregation. It has no body of canon law prescribing procedure in such cases. No written rules prescribe notice or require a trial. A majority of those members voting when the church sits in conference determines the result upon any motion or resolution disciplining a member. There was much conflict as to the practice of the church as to notice, charges, and trials. Some twenty-five cases of previous excommunications by this congregation were recorded in the church-minutes. In some of those cases there were charges and notice of time and place of trial. In others there seemed to have been no notice or trial; while in still others the records are silent. The opinions of members on the practice were, as might be expected, much in conflict. But, waiving this, and assuming that the usage of the church had been violated in the judgments of excommunication against complainants, we come to the question as to whether members so excluded can, in effect, appeal from such a sentence of an ecclesi-

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astical tribunal to a civil Court, or must the civil Court accept the fact of excommunication as a *fact*, whether regularly or irregularly pronounced. Complainants rely upon a line of cases which we think by no means conclusive. They may be divided into two classes:

*First*.—Cases of wrongful exclusion of corporators in civil corporations, whereby some civil or pecuniary right was affected. Of this class are the cases of *Bartlett v. Medical Society*, 32 N. Y., 187; *Commonwealth v. German Society*, 15 Penn. St., 251; *The State, ex rel., v. The Georgia Medical Society*, 38 Ga., 608; *King v. University of Cambridge*, 2 Ld. Raymond, 1347; *Rex v. Town of Liverpool*, 2 Burr., 734.

In all these cases a civil or educational or business corporation was concerned, and in all of them the power to compel admission was as clear as the power to reverse an illegal exclusion. In all a civil or property right was involved. The principle governing these cases is, that where a *legal* right of admission has been ignored, or where the grounds for expulsion are legally insufficient, that the Courts will inquire and adjudicate the right. This has become plain text-book law. 2 Kent's Comm., 298; Grant on Corporations, 245-248; Woods' Field on Corporations, Sec. 55.

Where a society has become incorporated for the purpose of maintaining religious worship, the rights of a *member* of the incorporation are one thing, and his rights as a member of the church wor-

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shipping in the building owned by the corporation may be quite another thing. His rights in the corporation and as a corporator will depend exclusively upon the law creating the corporation. The New York and Massachusetts cases, when compared with the Iowa cases, illustrate the difference between corporators who become such by church-membership alone and corporators whose rights are in no way dependent on church-membership. In New York the statute authorizing incorporation of religious societies has been construed as creating purely civil corporations, and that, under the Act, all attendants, regardless of church-membership, are corporators, and entitled to vote in all corporate elections for trustees. The title of the trustees, under such a statute, was held not to be affected by any change of religious views by themselves or those who elect them. *Baptist Church v. Wetheral*, 3 Paige, 296; *Petty v. Tooker*, 21 N. Y., 267.

In the latter case it was held that the property conveyed to such a statutory corporation could only be affected with a trust for the teaching of any particular faith or creed by an express condition in the deed.

In this case of *Hardin v. Baptist Church*, 51 Mich., 137, Judge Cooley drew a clear distinction between membership in a church and membership in a corporation by holding that a religious corporation, holding the title to church-property, was not liable to the suit of a church-member for illegal expulsion from the church. S. C., 47 Am. Rep., 555.

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So in the case of *Sale v. Baptist Church*, 62 Iowa, 26, it was held that a religious society could not be compelled to re-instate a member wrongfully expelled, although he thereby lost his rights as a corporator, which depended on church-membership.

The case of *Gray v. Christian Society*, 137 Mass., 329, has been much relied upon as sustaining the proposition that expulsion without notice and fair trial will be held void. The case does not support the proposition. The society was evidently an incorporation. It had a civil organization and a code of by-laws. By one of these it was provided that any member who should cease to worship regularly with the society, or should fail to contribute to the support of public worship for the time of one year, should be dropped from the list of membership. Another by-law prescribed that all persons owning or renting pews who should pay annually the sum of five dollars should be deemed members of the society, and entitled to vote at the annual meetings. At a meeting of the members, held to consider the sale of the society building, enough persons to have changed the result were present and opposed to the sale, if their votes had been received. These votes were rejected upon the ground that, having failed to comply with the by-law, they stood dropped. A bill was filed to restrain the sale. On these facts the Court held that the rejected votes should have been received, inasmuch as the facts as to their having failed to

attend regularly or to pay the annual dues were facts to be ascertained by trial after notice, and that the Moderator had no arbitrary power to decide these questions and refuse the votes of such persons until they had been upon trial excluded.

The cases cited to support the conclusion are English cases, relating to a very different relation of the church to the State—a relation settled by law and upon which civil rights rested. The case of *State v. Adams*, 44 Mo., 570, is the only American case cited by the learned Judge. That was the case of a removal of trustees of an educational corporation by an act of the legislature. The act declared a cause of removal, and then adjudged these trustees quietly and summarily ejected from the corporation. Manifestly neither this case nor the one which it is cited to support have any bearing upon the case in hand.

The *quasi* corporate power conferred upon a religious congregation to hold title to land for church-purposes under the Code, confers no other corporate privilege. The corporators—if in theory there be any—are the church-members, and when membership ceases all legal rights as a *quasi* corporator terminate. No such civil or property right is conferred by such *quasi* corporate relationship as to vest any independent right to remain a corporator after termination of church connection. The rights of complainants as beneficiaries under the deed conveying the property to this congregation depend, not upon their relation to this

*quasi* corporation, but upon their relation to the church.

The second class of cases referred to by complainants are those which relate to membership in unincorporated societies, whereby one acquires certain social or pecuniary rights—such as clubs, associations, and societies. If a member by membership acquires any advantage of a civil or pecuniary kind in such an association, some Judges have thought that wrongful expulsion gave a right of action. In all these cases the suit in law or equity has been sustained upon the ground that the relations of a member to such society were contractual, and if the relation had been severed in violation of the laws regulating membership, enacted by themselves, that there was a breach of contract. With reference to this class of cases the rule may be stated in the language of the Court in *Fisher v. Krone*, 11 Ch. Div., 353, “that in every proceeding before a club, society, or association having for its object the expulsion of a member, the member is entitled to be fully and fairly informed of the charge, and to be fully and fairly heard. And that the Court will, at the instance of any member so proceeded against, declare any resolution passed by the committee without previous notice to him, based upon *ex parte* evidence, and purporting to expel him from the club, to be null and void, and will restrain the committee by injunction from interfering, by virtue of such a resolution, with his rights of membership.”



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It is certainly a principle of universal justice that no man's civil or property rights or privileges shall be affected or adjudicated without an opportunity to be fully and fairly heard. The cases bearing upon this question are stated in the note to *Gray v. Christian Society*, 50 Am. Rep., 813.

But do these principles apply to church-membership?

If no civil, social, or property right attaches to such membership, there is no necessary analogy between this case and those involving the loss of some such right by expulsion.

The relations of a member to his church are not contractual. No bond of contract, express or implied, connects him with his communion or determines his rights. Church relationship stands upon an altogether higher plane, and church-membership is not to be compared to that resulting from connection with mere human associations for profit, pleasure, or culture. The church undertakes to deal only with the spiritual side of man. It does not appeal to his purely human and temporal interests. Admission to its fold is prescribed alone by the church, professing to act only upon the word of God. It claims the power of the keys by divine and not human authority. Its right to determine the grounds of admission has never been questioned. Why shall the co-ordinate right of exclusion be scrutinized by the civil power? No property rights of a personal kind depend upon membership. No pecuniary right, or civil right of

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any character, was affected by expulsion. A beneficiary under such a deed as that in question has no pecuniary interest whatever, and can never have. His only right as a beneficiary is to prevent the diversion of the property. It was upon this ground that the case of *Sale v. Baptist Church, supra*, was decided. Although expulsion deprived the member of his rights as a corporator to vote for trustees, yet, as his rights as a corporator depended upon his connection with the church, he was held to have no action against the corporation or any right to be re-instated.

Civil Courts deal only with civil and property rights. They have in this country no ecclesiastical jurisdiction. If, to determine a property right, it becomes necessary to adjudge an ecclesiastical question, the Courts will go only so far as is necessary to determine the effect of ecclesiastical law or relations on property rights. We are not to be understood as approving an expulsion from church-membership by irregular methods and without notice to the member. But here we have a fact to be dealt with—the fact that this church, sitting as a court, has determined for itself that it had the power and the right to exclude these complainants. They have, as a judicature, adjudged that they had the jurisdiction, and that the usage and law of the church did not demand other trial or notice than such as attended the public action of the church. The law of the church provides for no appeal to a higher tribunal. They may

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have erred in their procedure. It is not for a civil Court to revise their action in a matter so vital to their freedom as a church.

Defendants, in their answer, say they "protest as a church against the effort of complainants to be re-instated to church-membership by an appeal to the civil Courts. This church," say they, "with all deference to the Honorable Court, claims that in all matters purely ecclesiastical it is her prerogative, untrammelled by any earthly tribunal, to deal with its members, and that no civil tribunal is invested with the jurisdiction to annul its solemn decrees of excommunication of its members. \* \* It was never intended that the law should measure the religious status of the citizen. Shall a Chancellor adjudicate who shall partake of the Lord's-supper? Shall any church stand a suppliant before any earthly judicature and receive a reversal of a judgment of 'expulsion?'"

These be strong words, but true. We have been referred to no reported case where any civil Court in this country has undertaken to overrule the fact of excommunication upon any ground whatever. We think that the effect of the judgment of this congregation, it being that of the only judicature known to such an independent church, is as great as if it were the decision of the last church-judicature in a church more highly organized. The weight to be attached to the decisions of such ecclesiastical jurisdictions is well stated by Mr. Justice Miller in the great case of *Watson v. Jones*, 13 Wall., 728, who says:

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“In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no church. The right to organize voluntary religious associations, to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent, and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions should appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides.”

On the question of the jurisdiction of such tribunals, the same great Judge said:

“There is perhaps no word in legal terminology |

so frequently used as the word jurisdiction, so capable of use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application. As regards its use in the matters we have been discussing, it may very well be conceded that if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil Court or anywhere else. Or if it should, at the instance of one of its members, entertain jurisdiction, as between him and another member, as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil Court where it might be set up. And it might be said, in a certain general sense very justly, that it was because the General Assembly had no jurisdiction of the case. Illustrations of this character could be multiplied, in which the proposition of the Kentucky Court would be strictly applicable. But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character—a matter over which the civil Courts exercise no jurisdiction, a matter which concerns theological controversy, church-discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them—becomes the subject of its action. It may be said here, also,

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that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the Courts, all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil Courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may and must be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical degree would be determined in the civil Court. This principle would deprive these bodies of the right of construing their own church-laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would in effect transfer to the civil Courts, where property rights were concerned, the decision of all ecclesiastical questions."

The case of *Landis v. Cambell*, 79 Mo., 433, is a case very much in point. It was an action for libel. Plaintiff had been a member of a Presbyterian Church. The libel consisted in the publication of the statement that "You [meaning plaintiff] were by unanimous vote excommunicated." The defense was that the session of the church had excommunicated him; that the defendants, who

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were the pastor and elders of the church, constituted this session, and the publication was the official announcement of their action as a session.

The action of the session was claimed to have been void, as having been taken without notice of the charges or opportunity to defend, and that action thus taken was no excuse for the publication afterwards made.

The Circuit Judge charged the jury that if they believed from the evidences that the session, under the constitution of the Presbyterian Church, had no right to excommunicate plaintiff from the communion of said church without notice that they intended to proceed against him, and that if they did so proceed and adopt resolutions finding plaintiff guilty of malicious falsehood, and expelling him from the church, and agreed that this resolution so adopted should be afterwards read at a public meeting of the congregation, that then the fact that defendants claimed to be acting in an official capacity would be no excuse for such publication.

In a very able opinion the Supreme Court held this charge erroneous. The opinion, among other things, holding: "The civil Courts cannot review the decision of ecclesiastical judicatories in matters properly within their province under the constitution and laws or regulations of the church."

After citing a number of cases, some of which will be hereafter referred to, the Court proceeded to say: "Persons who join church, secret societies, benevolent associations, or temperance organizations,

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voluntarily subject themselves to the jurisdiction of those bodies, and in matters of faith and individual conduct affecting their relations as members thereof, subject themselves to the tribunals established by those bodies to pass upon such questions; and, if aggrieved by a decision against them, made in good faith by such judicatories, they must seek their redress within the organization, as provided by its laws and regulations. If the civil Court should assume jurisdiction to review such proceedings upon alleged errors, they would attempt to administer laws not recognized by the Constitution or laws of the State. Actions for libel and slander would crowd the docket of the civil Court, which would, on that theory, be open to the complaint of every man expelled from a church or Masonic lodge or any of the societies of which this age is so plentiful. \* \* \* It follows," continues the Court, "from the principles announced in the above cases, that if a judiciary of a church had jurisdiction, by its laws, to try a member for an offense involving immorality, its decision is final and not subject to be reviewed by the civil Court for alleged errors, and that the civil Court will not examine into the question of errors in the proceeding, but give it the same effect and form as if it had been regular in every respect." 50 Am., 209.

In *Harmon v. Drebur*, 1 Spears' Eq., 87, the South Carolina Court held that "a civil Court will not look into the regularity of the process



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by which an ecclesiastical body proceeds to judgment."

In the case of the *German Reformed Church v. Siebert*, 3 Penn. St., 282, it appears that Siebert had been expelled from the church without the consent of the congregation, which was required by the articles of the church-discipline; but the Court held "that the decisions of ecclesiastical tribunals are final, as they are the best judges of what constitutes an offense against the church of God and the discipline of the church. And said the Court: "Granting that the consistory had proceeded to disfranchise the relator without the consent of the congregation, the remedy is by appeal to a higher tribunal." The leading case upon the power of a secular court to look into the regularity of sentence of excommunication is that of *Shannon v. Frost*, 3 B. Monroe, 253. Six members of a Baptist Church had been expelled without charges or a trial. Uniting themselves with others of same faith, they elected officers, and claimed to be the church and to have the right to control the property. A conflict arose over the possession of the church, when the majority filed a bill to settle their rights. The opinion was delivered by Chief Justice Robertson, a great name in the law, who, among other things, said:

"This Court, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church-discipline or excision. Our only judicial power in the case arises from the conflicting claims of the parties

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to the church-property and the use of it. And these we must decide as we do all other civil controversies brought to this tribunal for ultimate decision. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church. We must take the fact of expulsion as conclusive proof that the persons expelled are not now members of the repudiating church, for, whether right or wrong, the act of excommunication must, as to the fact of membership, be law to this Court. For every judicial purpose in this case, therefore, we must consider the persons who were expelled by a vote of the church as no longer members of that church or entitled to any rights or privileges incidental to or resulting from membership therein. \* \* \*

“The judicial eye of the civil authority of this land of religious liberty cannot penetrate the veil of the church, nor can the arm of this Court either rend or touch that veil for the forbidden purpose of vindicating the alleged wrongs of the excluded members. When they became members they did so on the condition of continuing or not, as themselves and their church might determine. In that respect they voluntarily subjected themselves to the ecclesiastical power, and cannot invoke the supervision or control of that jurisdiction by this or any other civil tribunal.

“But the necessary consequence of the view we have taken of the proprietary or usufructuary rights

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of the parties is that there can be no reversal of the decree on the errors assigned by the appellants. Having once associated themselves with many others, as an organized band of professing Christians, they thereby voluntarily subjected themselves to the disciplinary and even expulsive power of that body. The voice of the majority has prevailed against them. They have, by that fiat, ceased to be members of that association; and, with the loss of their membership, they have lost all the privileges and legal rights to which, as members, they were ever entitled. Their only remedy now is, therefore, in their own bosoms—in a consciousness of their own moral rectitude, and in the consolations of that religious faith and those Christian graces which, under all temporal trials, will ever sustain the faithful Christian and adorn the pathway of his earthly pilgrimage. Their expulsion ought not to brand them with ‘immorality.’ In this record there is no proof of immoral conduct in either the popular, the ethical, or the biblical sense. They were expelled for alleged non-conformity, and contumacy adjudged against them, without a formal trial or hearing, by a dominant majority, as fallible perhaps as themselves. Self-doomed to the uncontrolled will of a majority of a church selected by themselves, they can obtain no redress in this forum. If their sentence be unjust, the only appeal is to the omniscient Judge of all.”

The congregation to which complainants belonged was congregational and independent. It was a

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pure democracy. The power of excommunication reposed in the majority of the members voting at any conference. From its action there was no appeal. This fact may be a defect in the organization. It is not for us to say, nor for those affected by its judgments to complain. They voluntarily submitted themselves to the absolute power of a majority. They tacitly agreed to abide by and submit to such judgment. This church, when sitting in conference was a judicature. It may have erred in construing the usage and practice of the church to justify a proceeding for expulsion without notice to the accused of the charges, and without giving him opportunity to vindicate himself. It, however, proceeded to adjudge excommunication. Its act was the act of the church. Complainants thereafter ceased to be members of this church. We cannot restore their names to the roll, or by mandamus compel recognition as members by the church which has repudiated them. Not being members of this church, they are not beneficiaries under the conveyance by which the church holds its church. They have, therefore, no such status as enables them to question the use of that property by the defendants.

The result is that, notwithstanding the force and effect of the verdict, the Chancellor should have dismissed the bill. His decree is therefore reversed.

The bill will be dismissed and complainants will pay the costs.

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NASHVILLE TRUST CO. v. BANK.

(Nashville. March 8, 1892.)

1. ASSIGNMENT, GENERAL. *How assignee takes.*

Under a general assignment for the benefit of creditors, the assignee takes the choses in action of his assignor, not as purchaser for value, but as a volunteer, and therefore subject to all the defenses and equities existing against them in the hands of the assignor. The assignee is the mere representative of the assignor and his estate, and stands in his shoes. (*Post*, pp. 345, 346.)

Cases cited and approved: 23 N. J. Law, 283; 2 Vern., 428; 9 Ves., 100; 1 Atk., 162; 10 Johns., 540; 2 Johns. Ch., 443.

2. EQUITABLE SET-OFF. *Insolvency a sufficient ground for. Example.*

Insolvency alone of debtor affords sufficient ground for the application of the doctrine of equitable set-off.

*Example:* An insolvent mercantile corporation made a general assignment of its assets for the benefit of its creditors. Among these assets was a bank deposit of \$5,222.66. The assignor owed this bank \$28,000, for which it had given its notes. These notes were not due at the date of the assignment. After the assignment had been perfected, the bank, with knowledge of its existence, applied the deposit in its hands on the assignor's notes, claiming payment in full to that extent, and *pro rata* on remainder of its debt.

*Held:* A proper case for equitable set-off. The application of the deposit by the bank to its notes on the assignor is approved. The fact that the notes were not due is deemed immaterial. (*Post*, pp. 347-354.)

Cases cited and approved: *Brazelton v. Brooks*, 2 Head, 193; *Hough v. Chaffin*, 4 Sneed, 238; *Gregory v. Hasbrook*, 1 Tenn. Ch., 220; *Edminson v. Baxter*, 4 Hay., 112; *Richardson v. Parker*, 2 Swan, 529; *Moseby v. Williamson*, 5 Heis., 287; *Comfort v. Patterson*, 2 Lea, 670; *Machine Co. v. Zackary*, 2 Tenn. Ch., 478; *Catrou v. Cross*, 3 Heis., 584; *Smith v. Mosby*, 9 Heis., 501; *Fields v. Carney*, 4 Bax., 137; 26 Barb., 310; 15 N. Y. Supp., 892; 120 U. S., 506; 129 U. S., 252.

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3. SAME. *Same. What assets must be ratably distributed.*

And the allowance of the equitable set-off in such case is not in conflict with the principle of equal and ratable distribution of the assignor's assets. The balance due constitutes the assets for distribution. (*Post*, pp. 354-357.)

Cases cited and approved: *Richardson v. Parker*, 2 Swan, 529; *Moseby v. Williamson*, 5 Heis., 287; *Comfort v. Patterson*, 2 Lea, 670; 4 N. B. R., 689; *Smith v. Mosby*, 9 Heis., 501; *McKenzie v. Schoffner*, 8 Bax., 408; 6 *Id.*, 71; 7 *Id.*, 332; 2 Vern., 428; 23 N. J. Law, 283; 1 Paige, 444, 112; 17 Wall., 610.

4. SET-OFF. *Right of exists, when.*

Although the creditor's claim against the assignor is not due at the date of the making of a general assignment, still the legal right of set-off can be enforced, even where assignor's assets are insufficient to pay all his debts, if, after such claim has fallen due, the assignee sues such creditor for a debt due the assignor's estate. (*Post*, pp. 357, 358.)

Code construed: § 3628 (M. & V.); § 2918 (T. & S.).

Case cited and approved: *Keith v. Smith*, 1 Swan, 92.

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FROM DAVIDSON.

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Appeal from the Chancery Court of Davidson County. ANDREW ALLISON, Ch.

EAST & FOGG, and J. C. McREYNOLDS for Trust Co.

DICKINSON & FRAZER for Bank.

JNO. A. PITTS, Sp. J. The Connell-Hall-McLester Company, a Tennessee mercantile corporation, located at Nashville, executed a general assignment to the Nashville Trust Company, for the benefit of cred-

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itors, on June 4, 1891. The deed of assignment conveyed to the assignee all the property and assets belonging to the assignor company, schedules being annexed, under oath, specifying, among other things, all moneys on deposit in the Fourth National Bank, of Nashville.

At the date of the assignment, the assignor company had on deposit, subject to its check, in said bank, \$5,222.66, and the bank held its four notes for borrowed money, due as follows: One due July 3, 1891, for \$10,000; one due July 17, 1891, for \$4,500; one due July 19, 1891, for \$9,000; one due August 22, 1891, for \$4,500. Making a total of \$28,000.

The bank, after the assignment was made and noted for registration, and on the same day it was made, with knowledge of the assignment, applied said deposit to the credit of the assignor upon its indebtedness to the bank on the above stated notes. Within three days after the assignment, the assignee drew its check upon the bank for the amount of the deposit, caused the same to be presented for payment, and payment was refused. The assignor is insolvent, and was insolvent at the date of the assignment, and will not pay its debts in full.

On December 4, 1891, the assignee and the Fourth National Bank submitted an agreed case to the Chancery Court at Nashville for decision upon the foregoing facts—the assignee claiming, as stated in the agreed case, “that it had the right to collect the deposit, and that it still has such right;

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or, if it has not this right, that in the *pro rata* distribution of the proceeds of the assets among the creditors of the Connell-Hall-McLester Company, it has the right to charge said bank with the sum so on deposit and appropriated as so much cash received on its *pro rata* share of said proceeds upon its debt of \$28,000;" and the bank claiming "that it had the right to appropriate said deposit in payment on said notes, prove its debt for the balance, and collect its *pro rata* share of the trust fund on said balance as other creditors, and that it now has such right."

These questions were submitted for decision, with the agreement that costs should be paid by the losing party.

The Chancellor held for the defendant, the bank, grounding his decision upon the doctrine of equitable set-off, and the complainant has appealed.

Two questions are now presented for decision. The first is, whether the doctrine of equitable set-off applied, and gave to the bank, immediately upon the assignment being made and the insolvency of the assignor established, the right to have the deposit credited upon or allowed as a set-off against the indebtedness of the assignor, not then due.

The complainant's counsel argues with much force and plausibility that the mere fact that one of the parties to independent cross-indebtedness is insolvent constitutes no ground for equitable set-off; that some connection of dependence or "mutual



credit," in addition to insolvency, is essential; that more especially is this so where the indebtedness of one of the parties is not due, and that, too, of the party *who is seeking to obtain the set-off*; that to apply the doctrine of set-off to such a case would be to allow a party to collect a debt before it is due, without the consent of his debtor, and thus violate the contract which the parties have made; and that, in this case, such a result would give the bank a preference over other creditors of the assignor, and violate the statute which provides for the equal *pro rata* distribution of the assets of insolvent debtors under general assignment, as well as the like statutory provisions in regard to insolvent corporations.

On the other hand, it is argued with equal force and plausibility for defendant, that insolvency is of itself a sufficient ground for equitable set-off, without any connection or "mutual credit" between the debts or parties; that connection and insolvency are separate and distinct grounds for such relief, each being alone sufficient; that where insolvency exists, it makes no difference that the indebtedness on one side is not due, nor which party is insolvent—whether the party seeking the set-off or the party resisting it; that under the statutes providing for the equal *pro rata* distribution of the assets of insolvent persons and corporations, the *assets* of the insolvent, in respect to choses in action, are only the *balances* due the insolvent estate after deducting all proper credits,

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counter-claims, and set-offs, as its liabilities are only the balances due from it, ascertained in like manner, and, therefore, that to allow the set-off claimed in this case is not to *disturb*, but to *preserve and enforce*, equality among creditors; and that to refuse it would be to give other creditors a preference over the bank, and work injustice to the latter, by compelling it to pay in full what it owes to the insolvent and take a *pro rata* on what the insolvent owes it.

The second question is—the indebtedness on both sides being due when the agreed case was filed—whether the bank has the legal right of set-off.

On this question, in addition to the contentions already suggested, it is insisted for complainant that the rights of the parties were fixed at the date of the assignment, and the bank having no right to set-off at that date, it has not such right now; that the lapse of time did not enlarge defendant's right in this respect; and that the assignee represents the creditors of the assignor, and not the assignor only, and, therefore, that the assignee is not to be regarded as standing in the shoes of the assignor simply.

On the other hand, it is insisted for defendant that the assignee takes not only as a volunteer, subject to all the equities existing against the assignor, and not as a purchaser for value, but also as the *personal representative* of the assignor, and stands for and in the place of the assignor in all

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respects, except as to personal liability; that the agreed case is, in effect, a suit to recover the deposit by the Connell-Hall-McLester Company, by its assignee and personal representative; and that the debts being mutual and all due, the bank has the legal right of set-off to the extent of the deposit.

Opposed as they are to each other, the positions of counsel are each supported by apparently well-considered cases on both of the general questions stated; but no adjudication of this Court upon a similar state of facts has been cited, nor is the Court aware of any case in this State in which the precise questions here raised have been decided. The adjudged cases in this country and in England, and the text-books founded upon them, are in hopeless and irreconcilable conflict on many of the points involved. Any effort to reconcile them would be utterly futile. There is no touchstone of reason that will distinguish and harmonize them upon any general principle applicable to all of them, for their antagonism is not apparent simply, but real and fundamental. They but furnish one of the many illustrations of that diversity of judgment which is inherent in the minds of men, which often, out of substantially similar raw materials and general conditions, has founded and built up dissimilar systems of jurisprudence, and which, too, often proves a delusion and a snare to the worshiper of mere precedent.

We must, therefore, look for guidance to the

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policy of our own State on the general subject, and to the principles involved which appear to be sanctioned by reason and the weight of authority. And, first of all, it must be remembered that the doctrine of set-off, whether legal or equitable, is essentially a doctrine of equity. It was that natural justice and equity which dictates that the demands of parties mutually indebted should be set off against each other, and only the balance recovered, that gave birth to the idea of accomplishing that result in a judicial proceeding. The common law, for simplicity of procedure, determined otherwise, and held that each claim must be prosecuted separately. "The natural sense of mankind," says Lord Mansfield, "was first shocked at this in the case of bankrupts; and it was provided for by 4 Ann, C. 17, Sec. 11, and 5 Geo. II., C. 30, Sec. 28." *Green v. Farmer*, 4 Burrow, 2214, 2220, cited in 2 Story's Eq. Jur., Sec. 1433.

"In pursuance of these old statutes, and of the dictates of equity," says the Supreme Court of the United States, in *Carr v. Hamilton*, 129 U. S., 255, 256, "the principles of set-off between mutual debts and credits has for nearly two centuries past been adopted in the English bankrupt laws, and has always prevailed in our own whenever we have had such a law in force on our statute-book; and it mattered not whether the debt was due at the time of bankruptcy or not." Citing authorities.

The jurisdiction of Courts of Equity over the subject of set-off was exercised before there was

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any statute upon the subject. *Hawkins v. Freeman*, 2 Eq. Cas. Abr., 10; *Chapmon v. Derby*, 2 Vern., 117. And has often been applied in cases not within the statutes. *Williams v. Davies*, 2 Sim., 461; *Ex parte Prescott*, 1 Atk., 331; *Lord Lounsborough v. Jones*, 1 P. W., 326; *Green v. Darling*, 5 Mos., 207.

By the civil law, from which the great body of our system of equity comes, a cross-debt was, by mere operation of law, without any act of the party, *extinguished*. It was treated as an absolute payment. Courts of Equity in this country, while not going so far, have accomplished the same result in numerous cases, by granting perpetual injunctions against judgments in favor of insolvent persons who were indebted in larger amounts to the judgment debtor. *Brazelton v. Brooks*, 2 Head, 193; *Hough v. Chaffin*, 4 Sneed, 238. And in other cases where, on account of the non-residence of the judgment plaintiff, or for other reason, the defendant could not save the demand due himself except by setting it off against the judgment. *Gregory v. Hasbrook*, 1 Tenn. Ch., 220; *Edminson v. Baxter*, 4 Hay., 112; *Waterman on Set-off*, Sec. 431. The Court, in all such cases, is governed, not by the statute of set-off, but by the general principles of equity. *Jeffries v. Evans*, 43 Am. Dec., 158. And the general principle of equitable set-off seems to be, that it will be allowed where the party claiming it appears in good conscience to be entitled to it, and no superior equity in

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favor of the party resisting it will be thereby defeated. Waterman on Set-off, Sec. 439. The same author says: "The natural equity to have mutual but unconnected demands between two parties who have been dealing with éach other set off, is, as a general rule, superior to the claim of any other creditor who has not dealt with the insolvent upon the faith of the specific fund against which the right of set-off is claimed." Sec. 438.

With these general principles in view, we proceed to examine the reasons urged in argument for and against the application of the doctrine of equitable set-off in this case.

And, *first*, as to the capacity in which the complainant stands before the Court. Is the Nashville Trust Company to be regarded as standing in the shoes of its assignor—the Connell-Hall-McLester Company—or upon different and higher ground?

On this point the authorities are not in harmony; but we are of opinion that reason and the weight of authority support the view that an assignee for the benefit of creditors takes the choses in action of his assignor, not as a purchaser for value, but as a volunteer, and therefore subject to all the defenses and equities existing against them in the hands of the assignor; and not only so, but that he holds as the *representative* of the assignor and his estate, and in this respect is to be distinguished from a particular assignee holding for himself, either as volunteer or purchaser. Burrell on Assignments, Sec. 391; 3 Zab. (N. J.), 283;

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*Receivers v. Paterson Gas-light Co.*, 2 Vern., 428, note 1; *Mitford v. Mitford*, 9 Ves., 100; *Brown v. Heathcote*, 1 Atk., 162; *Classon v. Morris*, 10 Johns., 540; *Murray v. Lylburn*, 2 Johns. Ch., 443. He receives the legal title, not for himself, but in trust to collect and disburse to creditors. All rights of action of the assignor pass to him for this purpose; and to all suits against the assignor's estate, and which are to affect the assets in his hands, he must be a party. This is the estate, and these are the functions of an ordinary administrator or personal representative. It is frequently said of such an assignee, that he represents the creditors, as it is said of an administrator, where the estate is insolvent, that *he* represents creditors, and where it is solvent, that he represents distributees; and in the sense in which it is so said, it is true. But by this is manifestly meant no more than that the representative's ultimate accountability is to the classes of persons who stand to him in the relation of beneficiaries—who are ultimately to receive the fruits of the trust he is administering—whether it be the estate of a living or dead person, or that of a corporation. His right to maintain suits upon the choses in action passed to him from the assignor by the assignment obviously rests upon the fact that he represents the assignor, in whom were vested originally the title and right of action. This title and this right of action were never vested in the creditors, and did not come to the assignee from them.

*Secondly*, as to insolvency. Is insolvency of itself a sufficient ground for the application of equitable set-off?

"It is deducible from the general scope of the authorities," says Mr. Waterman, "that insolvency has long been recognized as a distinct equitable ground of set-off." Waterman on Set-off, Sec. 432.

Numerous authorities are cited by the learned author, but it is not deemed useful or necessary to review them, as this Court has repeatedly so held. *Brazelton v. Brooks*, 2 Head, 193; *Hough v. Chaffin*, 4 Sneed, 238; *Gregory v. Hasbrook*, 1 Tenn. Ch., 220; *Edminson v. Baxter*, 4 Hay., 112; *Richardson v. Parker*, 2 Swan, 529; *Moseby v. Williamson*, 5 Heis., 287; *Comfort v. Patterson*, 2 Lea, 670; *Howe Machine Co. v. Zachary*, 2 Tenn. Ch., 478; *Catron v. Cross*, 3 Heis., 584; *Smith v. Mosby*, 9 Heis., 501; *Fields v. Carney*, 4 Bax., 137.

*Thirdly*, as to the fact that the indebtedness on one side is not due when the set-off is claimed.

It seems to be conceded by counsel for complainant that the fact that the indebtedness *from the party claiming the right of set-off* is not due would constitute no obstacle, as he might be allowed, if he chose, to expedite payment of a debt due from himself without doing any injustice to the opposite party. But it is earnestly insisted that it is quite different where it is the debt *against which the set-off is claimed* that is not due; that, in such case, to allow the set-off, and thereby compel payment of a debt not due without the



consent of the debtor, is to violate the *contract* of the parties, and work injustice to the debtor whose demand is thus anticipated and collected before maturity.

The argument is persuasive, and not without the support of respectable authority. *Spaulding v. Bachus*, 122 Mass., 553 (S. C., 23 Am. Rep., 391); *Hannon v. Williams*, 34 N. J. Eq., 255 (S. C., 38 Am. Rep., 378); *Jordan v. National Shoe and Leather Bank*, 74 N. Y., 467 (S. C., 30 Am. Rep., 319); *Lockwood v. Beckwith*, 6 Mich., 168 (S. C., 72 Am. Dec., 69); and *Waterman on Set-off*, Secs. 131, 132, all seem to support this position, as do other cases not cited. The most of these and like cases seem to be, and many of them are, expressly based on the principle stated and illustrated in *Pothier on Obligations*, 590, as follows:

“I am your debtor for six pipes of wine of a particular vintage. You are my debtor for six pipes of wine generally. I may demand the six *particular* pipes, and, therefore, *you* cannot offset the general debt for six pipes; but *I* may offset my particular pipes, if I please, against yours, because I could turn them out to you in payment of the general debt.”

It is obvious that this illustration does not involve any principle of equitable set-off. It is only the statement of the general principle, applicable not only to the *law* of set-off, but to contracts as well, that an obligation payable in one commodity cannot be paid in another without the consent of

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the payee. At most, as applied to the case in hand, it means that a debtor whose debt is due has no right, nothing more appearing, to set off against it a debt in his favor not due. But this is only stating a general rule of legal set-off everywhere conceded. The fact of insolvency of one of the parties is not involved. In the absence of insolvency or some equivalent equity, it will not be anywhere contended that a debt not due can be set off against a debt that is due, any more than that six pipes of wine generally can be set off against six particular pipes of wine.

The case of *Spaulding v. Bachus, supra*, relied on for the distinction under consideration, is not strictly an authority for the position; for, while the learned Court does approve the distinction that a party cannot anticipate payment of an unmatured debt to himself by setting off against it a debt due from himself presently payable, notwithstanding the insolvency of the complainant, the suit in that case was by or for the benefit of an assignee by purchase, and the real question was whether a debt owing by the defendant to the assignor at the date of the assignment, though not then due, was to be regarded as an equity so attached to the assigned debt as to carry with it the right of set-off as against the assignee with notice of assignor's insolvency. The holding in the negative is not necessarily inconsistent with the right of set-off as between the original parties, and appears entirely consistent with the de-

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cisions of this Court that a right of set-off, to be so attached to the debt as to be available against it in the hands of an assignee for value, must be complete and perfect at the date of the assignment. *Gatewood v. Denton*, 3 Head, 381; *Litterer v. Berry*, 4 Lea, 193; *Catron v. Cross*, 3 Heis., 584.

*Lockwood v. Beckwith*, *Jordan v. National Shoe and Leather Bank*, and *Hannon v. Williams* do fairly hold the proposition contended for by complainant's counsel. The effect of the sections cited from *Waterman on Set-off* is, that the set-off will be allowed where the debt not due is in favor of the party against whom the right of set-off is asserted. It is only by implication that the learned author can be treated as against the right in cases like the present.

We cannot agree with these authorities, either in their reasoning or result.

The question is, Assuming the insolvency of the party owing the unmatured debt, can his debtor, when sued by the insolvent on a debt which is due, set off against it in equity the unmatured debt because of the insolvency? We are of opinion that both reason and the weight of authority answer in the affirmative.

In connection with the general principle of equity before alluded to, that a set-off will be allowed where the party appears in good conscience to be entitled to it, and where no opposing equal or superior equity will be defeated—and we are

treating the case now upon the idea that it is only the insolvent himself that is resisting—it must be remembered that it is only where, for some reason, the law cannot avail the party that equity intervenes at all. If both parties were solvent, so that both debts might ultimately be collected, the law would afford adequate relief, and no injustice would be wrought to either party. The one could not suffer by having to pay his own debt according to his contract, if he could ultimately compel the other to pay his debt according to his contract. But it is this very fact—that if the one pays the debt due from him, he cannot compel payment of the debt due to him, and will thereby suffer irreparable loss, and his inability to protect himself by set-off at law because *his* debt is not due—that creates his equity, and the necessity for equitable relief. Does it lie in the mouth of an insolvent to say that his contract is violated, and thereby defeat so manifest an equity, when it is apparent that he cannot himself perform that contract? Should a Court of conscience be so over-scrupulous of the rights of one party to a contract as to refuse to permit a slight variance even as to him, when it can plainly see that thereby it will wholly destroy the contract as to the other party?

Technicalities are not to be so sweeping in their consequences. This Court looks to the substance and not to the shadow of things. It is the very fact that the contract *cannot* be performed literally

as made, that calls upon the Court, *ex aequo et bono*, to compel such substantial performance as is possible.

But it will be found, upon examination, that this objection may be urged with equal force in almost if not every case where the doctrine of equitable set-off has been applied. Take, for example, the case of a judgment on the one side and a simple contract debt on the other. The judgment plaintiff is entitled to immediate execution and to collect his money *at once*. He does not have to await the law's delay and the expense of litigation. He has not only the right to demand his money, but to compel payment at once by final process before the defendant can possibly obtain judgment and place himself on equal footing in respect to the debt due him. He must await the delay of legal proceedings, while the plaintiff in the judgment may, in the meantime, in the exercise of not only a contract right, but a contract right sanctioned by the final judgment of the Court, proceed to collection at once. And yet, it has never been considered that this right of a judgment plaintiff, *if he is insolvent*, stands in the way of equitable relief to the other party by injunction and set-off, although it cannot be said that there is here any less violation of the clear *legal* right than there is in setting off a debt not due against one that is due and payable.

The right of set-off in such and like cases is sanctioned by many authorities.

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In *Jones v. Robinson*, 26 Barb., 310, approved in 2 Waterman on Corp., Sec. 371, it appeared that Jones had to his credit in bank a deposit of \$924 at the time the bank failed and a receiver was appointed; and the bank held Jones' note for \$391.43, which matured three days after the receiver was appointed. Held, set-off proper.

In *Fra v. Wickham*, Sup. Ct., N. Y., Oct., 1891, reported in New York Supplement, 892, the right of set-off was upheld in a case like this, except that the parties were natural persons instead of corporations.

In *Schuler v. Israel*, 120 U. S., 506, the Supreme Court of the United States approves the same doctrine in a garnishment proceeding, the syllabus, fairly supported by the opinion, on this point being: "A garnishee has a right to set up any defense against the attachment process which he could have done against the debtor in the particular action; and if the debtor be insolvent, and owes the garnishee on a note not due, for which he has no sufficient security, he is not bound to risk the loss of his debt in answer to the garnishee process." The facts appearing in the answer of the garnishee, he was discharged.

In *Carr v. Hamilton*, 129 U. S., 252, the same doctrine was applied between an insolvent life insurance company and the holder of an unmatured endowment policy, who was also indebted to the company for a loan, past due at the date of insolvency.

In *Kentucky Flour Company's Assignee v. Merchants' National Bank*, S. W. Rep., Vol. 13, p. 910, the doctrine was applied by the Supreme Court of Kentucky in a case precisely similar to this. Referring to the particular question now under consideration, the Court in that case say:

"It is unquestionably the law that, as between individuals, the right of equitable set-off exists, although the debt had not matured at the time of the insolvency. Ordinarily, of course, a debt not due cannot be set off against one already due. To allow it would be to change the contract and advance the time of payment. But where the party asserting the due debt is a non-resident or becomes insolvent, then either of these conditions, *ipso facto*, gives to the other party the right of equitable set-off, although his debt had not matured when the debtor became insolvent or the condition arose giving the right of equitable set-off."

We conclude, therefore, that insolvency is a good ground of equitable set-off, even where the indebtedness on one side is not due, and that it makes no difference in which party's favor is the unmatured debt. The supposed hardship or injustice resulting from the anticipation of the unmatured debt may and should be wholly obviated by discounting it or adding interest to the due debt for the unexpired time of the debt not due, and in this way equalize the interest.

*Fourthly*, as to the effect of the statutes providing for the equal and ratable distribution among

creditors of the assets of insolvents under general assignments and of insolvent corporations.

Without elaborating this question, it is sufficient to say we are of opinion that the position of defendant is the correct one. Under a similar statute in reference to the estates of insolvent deceased persons, this Court held, in *Richardson v. Parker*, 3 Swan, 529, that it is only the balance remaining in favor of the estate after all just settlements with debtors that goes into the fund for distribution. These balances are the "assets" to which the statute refers. In that case a set-off was allowed to the debtor of an insolvent estate in a suit by the administrator against him; and although it was a case of legal set-off purely, we are of opinion the principle announced applies equally to the case of equitable set-off. The Court has, in fact, shown a disposition to extend the principle to every case. It was so expressly extended to insolvent corporations in *Moseby v. Williamson*, 5 Heis., 287, and to a general assignment by an insolvent bank in *Comfort v. Patterson*, 2 Lea, 670. It has also recognized that the same principle is applicable to the estates of bankrupts under national bankrupt laws. 2 Swan, 530; 5 Heis., 287; 2 Tenn. Ch., 479, and cases there cited. And the principle has been uniformly so applied by the bankrupt Courts. *Drake v. Rollo*, 4 Nat. Bankrupt Reg., 689; *In re City Bank of Savings*, 6 *Id.*, 71; *In re H. Petrie*, 7 *Id.*, 332; 2 Vern., 428, note 1. It is applicable to receiv-



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ers of corporations under State statutes. *Receivers v. Paterson Gas-light Co.*, 3 Zab. (N. J.), 283; *Miller v. Receivers of Franklin Bank*, 1 Paige, 444; *McLaren v. Pennington*, 1 Paige, 112. Also to receivers of insolvent national banks. *Platt v. Bently* (N. Y.), 11 Am. Law Reg., N. S., 171; *Wait's Ins. Corp.*, Sec. 549. And this, too, although the law of set-off is held not to have been enlarged by either the bankrupt or national bank acts. *Sawyer v. Hoag, Assignee*, U. S. Sup. Ct., 1873, 9 Nat. Bankrupt Reg., 145; *Platt v. Bently*, *supra*.

In these and numerous like cases the Courts proceed upon the idea so well expressed by the New Jersey Court in *Receivers v. Paterson Gas-light Co.*:

"The object of the Act is to do *equal justice* to all the creditors; and *equality is equity*. But equality of what and among whom? Clearly of the *assets* of the bank among the *creditors* of the bank. In cases of cross-indebtedness, the assets of the bank consist only of the *balance* of the accounts. That is all the fund which the bank itself would have had to satisfy its creditors in case no receiver had been appointed. And there is no *equality* and no *equity* in putting a debtor of the bank who has a just and legal set-off as against the corporation, in a *worse* position, and the creditors in a *better* position, by the failure of the bank and the appointment of receivers." 3 Zab., 294, 295.

In that case, although the debt to the bank

was not due at the time of failure and the appointment of receivers, the defendant was allowed, in a suit brought after maturity, to set it off against a debt due by him to the bank at the date of failure.

These considerations and authorities are equally conclusive against the argument of complainant that the rights of the parties were *fixed* at the date of the assignment. It is true they were fixed in the sense that a debtor of the assignor could not thereafter *purchase or acquire* a debt against the assignor and set it off against his own debt to the assignor. *McGinnis v. Allen*, 2 Swan, 645. Unless the debt was *held* at the date of assured insolvency, in case of a corporation, or at the date of the assignment of an insolvent debtor or the death of an insolvent decedent, it cannot be set off. *Id.*; 5 Heis., 287; 2 Swan, 529; 9 Heis., 501, 506; 8 Bax., 408. If the estate be solvent, the set-off will be allowed, although acquired after the death of plaintiff's intestate. 2 Swan, 645.

The second question presented by the agreed case is, whether the *legal* right of set-off existed when the suit was commenced.

The indebtedness on both sides being then due, and *mutual* under the rules herein announced, it would seem that the only question remaining is, whether the agreed case is to be treated as in effect a suit to recover the deposit.

We are of opinion that it must be so treated.

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We do not so hold simply because the assignee appears as complainant on the record and in the agreed statement. That is a circumstance, it is true; and the case being a controversy between parties, one or the other must be regarded as the actor or complainant. Looking to the substance of the controversy and relief sought, it is seen that the assignee asserts the right to recover the deposit, in the first instance, or, if not, then to have the Court to declare its right to charge up the amount of the deposit to the bank as so much cash paid on its *pro rata*, which is manifestly the same thing, as the statement shows the bank will be entitled to receive more than that amount in any event. On the other hand, the bank is seeking no decree at the hands of the Court, further than to have declared valid its previous act applying the deposit as a payment on the notes, or its right now to have it so applied—either right being sufficient to repel the assignee. We think, therefore, that the case is, in effect, a suit by the assignee to recover the deposit, commenced on December 4, 1891; and, therefore, that the Chancellor's decree, in its result, is supported by the bank's *legal* as well as *equitable* right of set-off, the original equitable right having ripened into and become a legal one before the suit was commenced. *Keith v. Smith*, 1 Swan, 92; Code (M. & V.), § 3628, subsec. 1.

The Chancellor's decree is, therefore, affirmed, and the assignee, out of the assets in its hands, will pay costs.

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Hawkins v. Alexander.

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## HAWKINS v. ALEXANDER.

(Nashville. March 17, 1892.)

1. FORCIBLE ENTRY AND DETAINER. *Bond for rents not required upon defendant's appeal, when.*

An unsuccessful defendant, who appeals from a justice's judgment in forcible entry and detainer, and is permitted to remain in possession, cannot be required to give bond for rents of the land accruing during the pendency of the appealed case in the Circuit Court. The plaintiff's remedy is to give bond for rents himself, and take and hold possession pending the appeal.

Code construed: §§ 4090, 4092 (M. & V.); § 3360 (T. & S.).

Acts construed: Acts 1869-70, Ch. 64; Acts 1871, Ch. 75.

Cases cited and approved: Norton v. Whitesides, 5 Hum., 381; Lynn v. Manufacturing Co., 8 Lea, 29; McGhee v. Grady, 12 Lea, 92.

*Aliter*, where case is removed to Circuit Court by *certiorari*, or taken from Circuit to Supreme Court by appeal.

(See Code, § 4099 (M. & V.), and Acts 1879, Ch. 85.)

2. SAME. *Same. Judgment for rents erroneous.*

And judgment of the Circuit Court for rents given upon such bond, if improperly required, is erroneous and reversible.

Cases cited and approved: Ladd v. Riggle, 6 Heis., 620; Sherrill v. Madry, 6 Lea, 231.

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FROM FRANKLIN.

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Appeal in error from Circuit Court of Franklin County. M. D. SMALLMAN, J.

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Hawkins v. Alexander.

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Action of unlawful detainer by J. R. Hawkins against Alexander and Brazelton. From judgment before the Justice of the Peace in favor of the plaintiff, the defendants appealed, and remained in possession.

In the Circuit Court the defendants were required to give bond to cover rents that should accrue pending the appeal.

Defendants were again unsuccessful in the Circuit Court, and judgment entered against them and their sureties upon their bond. Defendants appealed.

GEO. E. BANKS for Hawkins.

ESTELL & ALEXANDER for Alexander.

LURTON, J. This is an action of unlawful detainer begun before a justice. There was judgment in favor of the plaintiff, from which the defendants appealed to the Circuit Court. Pending the appeal, defendants were suffered to remain in possession, the plaintiff not choosing to avail himself of his right to sue out a writ of possession, which he might have done, notwithstanding the appeal, upon giving the bonds required by the statute. Code (M. & V.), § 4092.

Defendants had executed a bond, upon obtaining this appeal, in the sum of \$250, conditioned, upon failure to prosecute successfully, to pay all costs and damages, and to abide by and perform the judgment of the Court.

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Hawkins v. Alexander.

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At the April Term of the Circuit Court the defendants, under order of the Court, executed another bond to secure rents pending appeal. At the succeeding term they dismissed their appeal, whereupon the court entered up judgment upon this latter bond for the value of the rents pending the appeal. From this judgment for rents they have appealed. Under § 3360, Code of 1858, the defendant, upon appealing from a judgment against him in an action of this kind, was required to give a bond, "as in the case of a *certiorari*," in double the value of one year's rent, conditioned to pay all costs and damages. Under that provision an appeal in *forma pauperis* did not lie. *Norton v. Whitesides*, 5 Hum., 381.

The bond was intended to secure rents pending the appeal, and was the only protection the plaintiff had against a frivolous appeal. But by the subsequent Acts of 1869-'70, Ch. 64, and 1871, Ch. 75, carried into the compilation of Milliken and Vertrees at §§ 4090 and 4092, the successful plaintiff was given the right to sue out and have executed a writ of possession, upon giving bond in double the value of one year's rent, conditioned to pay all costs and damages accruing from the wrongful suing out of the writ. The effect of these Acts has been to allow the defendant to appeal in such cases, upon giving ordinary cost-bond or upon the pauper's oath. This was expressly so ruled in *Lynn v. Tellico Manufacturing Company*, 8 Lea, 29; and approved in *McGhee v. Grady*, 12 Lea, 92.

There was therefore no authority for the requirement of the bond to secure rents. If the plaintiff suffered the defendant to remain in possession after the judgment of the Justice, he did so at the risk of the loss of his rent, for he can look only to his personal action for rents after recovery of possession. The defendant in such a judgment by a Justice can only secure his possession pending further litigation by suing out writs of *certiorari* and *supersedeas*, and entering into bond to secure costs and rents. Code (M. & V.), §§ 4093, 4094. Or if the judgment of the Circuit Court be adverse to him, he can remain in possession by executing bond to secure rents pending appeal to this Court, as required by the Act of 1879, Ch. 85, and Code (M. & V.), § 4099. Notwithstanding defendants gave bond to secure rents pending appeal to the Circuit Court, there was no jurisdiction to render judgment for such rents. A similar ruling was made by this Court before the Act of 1879, Ch. 85, in regard to a like bond made in the Circuit Court to secure rents pending appeal to this Court. *Ladd v. Riggle*, 6 Heis., 620; *Sherill v. Mady*, 6 Lea, 231.

The result is, that the judgment for rents pending appeal was erroneous and must be reversed. There will be judgment here against Alexander & Brazelton for the costs of the Justice and of the Circuit Court, and judgment against Hawkins for the costs of this Court.

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Simmons v. Taylor.

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## SIMMONS v. TAYLOR.

(Nashville. March 19, 1892.)

I. FORCIBLE ENTRY AND DETAINER. *Recovery of rents upon certiorari and supersedeas bond, where had.*

Upon removal of a forcible entry and detainer case, by an unsuccessful defendant, from the Justice's Court to the Circuit Court by *certiorari* and *supersedeas*, he is required to give bond with sureties "of sufficient amount to cover, besides costs and damages, the value of the rents of the premises during the litigation." And if upon the trial in the Circuit Court the plaintiff recovers the land, the statute provides that the jury shall "ascertain and find the value of the rents during the time the plaintiff has been kept out of possession, and the Court shall give judgment against the defendant and his sureties accordingly."

*Held*: The statute is mandatory, and that the remedy upon the bond for rents therein provided is exclusive. The sureties on the bond cannot be held for rents in a separate suit, but only in the forcible entry and detainer case.

Code construed: §§ 4093, 4094 (M. & V.); §§ 3373a, 3363 (T. & S.).

Case cited and approved: *Weigand v. Malatesta*, 6 Cold., 366.

Case cited and distinguished: *White v. Bowman*, 10 Lea, 55.

## 2. RES ADJUDICATA.

And therefore the judgment in the forcible entry and detainer case is *res adjudicata* as to the liability of the sureties on the bond for rents, and a complete bar to a subsequent suit upon that bond, although the matter of rents was not in fact considered on the trial of the forcible entry and detainer case, and the judgment in that case is silent as to rents.

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FROM FRANKLIN.

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Appeal in error from Circuit Court of Franklin  
County. M. D. SMALLMAN, J.



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Simmons v. Taylor.

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J. H. SMITH for Simmons.

JAMES TURNEY for Taylor.

CALDWELL, J. This is an action on a *certiorari* and *supersedeas* bond.

Dick Taylor rented a house and lot in Winchester to Scott Davis. After the expiration of the contract, he commenced an action of unlawful detainer before a Justice of the Peace to recover possession of the property. The Magistrate rendered judgment in his favor, and awarded a writ of possession. Thereupon Davis filed his petition in the Circuit Court, and obtained writs of *certiorari* and *supersedeas*, executing proper bond, with John Simmons as surety thereon. The case was tried before Court and jury, resulting in a verdict and judgment in favor of Taylor.

The present action was brought before a Justice of the Peace, upon the *certiorari* and *supersedeas* bond executed in that case, to recover the rental value of the house and lot during the pendency of that suit in the Circuit Court. The Magistrate's judgment was adverse to Taylor, and he appealed to the Circuit Court. There verdict and judgment were in Taylor's favor for \$25.33. From that judgment Simmons appealed in error to this Court.

What is the legal effect of the judgment in the former suit upon the right of plaintiff to the recovery sought in this case?

Counsel of plaintiff in error contends that the judgment in that suit concludes the question of

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rents, and effectually bars the present action. While, on the other hand, Taylor's counsel insists that, as a matter of fact, the question of rents was not considered in the other suit, and that, therefore, it is open for adjudication in this action.

There is no affirmative proof that any issue was formed or controversy raised with reference to the matter of rents in the former suit. The record in that case does not show that the question was considered by the jury or adjudged by the Court. The verdict was general, the jury simply finding "the matters in controversy in favor of the plaintiff," Taylor; and upon that verdict the Court simply adjudged "costs" against Davis and his surety, and awarded a writ of possession in favor of Taylor.

It is plausibly argued, and may be conceded, that, *as a matter of fact*, the question of rents was not adjudged in that case; but whether the judgment there rendered should be held to operate in law as *res adjudicata* of that question, and thereby preclude Taylor from maintaining this action, is not so easily decided, and does not necessarily depend upon that proposition.

The trial Judge instructed the jury that the present action could be maintained, and that plaintiff was entitled to recover rents accruing while the former suit was pending if they should find that "the question of rents was not settled" in that case, and that the rents had not otherwise been paid.

By the Act of 1835, Ch. 35, secs. 1 and 2 (Car. & Nich., 348), a person seeking *certiorari* and *supersedeas* in an action of forcible entry and detainer, or of *unlawful detainer*, was required to give bond, first, for costs and damages resulting to the adverse party from the wrongful prosecution of such writs, and, secondly, "to pay and satisfy the defendant in damages for the wrongful detention of the premises."

A bond executed under that statute was severable, and afforded proper foundation, if breached, for two distinct judgments in separate actions—one being based upon the former and the other upon the latter condition in the bond. A judgment in the first suit against the petitioner and his surety for costs and awarding a writ of possession, as in the case now under consideration, did not, under that statute, preclude a separate and distinct action by the landlord upon the bond to recover "damages for the unlawful detention of the premises." *Hurt v. Dougherty*, 3 Sneed, 418.

Section 6, Ch. 86, Acts of 1842, met the same purpose as the Act of 1835—that of securing to the landlord his rents as well as costs of suit—by such change of phraseology as to require the petitioning defendant to give bond in double the value of *one year's rent* of the premises, conditioned to prosecute the *certiorari* with effect or pay all costs and damages arising from wrongfully suing it out. Nicholson's Stat., 167; Code of 1858, § 3362.

The landlord's protection was enlarged by the

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Simmons v. Taylor.

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second section of Ch. 67, Acts of 1869-70, so as to require petitioner to give bond "of sufficient amount to cover, besides costs and damages, the value of the rent of the premises *during the litigation.*" Code (T. & S.), § 3373*b*; (M. & V.), § 4093.

Such was the law when Davis gave the bond upon which the present action is based, and such is the legal effect of the obligation on which appellant, Simmons, became surety.

Though the same in extent, covering both costs and rents, his obligation is not severable, as were bonds executed under the Act of 1835; and, besides that difference, the remedy on *certiorari* and *supersedeas* bonds was changed after the passage of that act.

The sixth section of Ch. 86, Acts of 1842 (in addition to the requirement that the bond should be in double the value of one year's rent of the premises), provided that "if the defendant shall obtain the *certiorari*, and, upon the trial in the Circuit Court, the jury shall find that the plaintiff is entitled to possession of the land, they shall ascertain and find the value of the rents during the time the plaintiff has been kept out of possession; and the Court shall give judgment against the defendant and his securities accordingly." Nicholson's Stat., 167. -

This latter provision was carried into the Code of 1858 at § 3363, and is found in the compilation by Milliken and Vertrees at § 4094. It is now the prevailing law on that subject.

Manifestly, the object of the Legislature was thereby to provide for and *require* a full and complete adjudication of the question of rents in the pending suit, without turning the parties over to a second litigation about it. The remedy thus given is exclusive, the only one left or allowed, at least so far as liability upon the bond is concerned.

The terms of the statute are mandatory. They require, in the given case, that the jury "*shall* ascertain and find the value of the rents," and that "the Court *shall* give judgment against the defendant and his securities accordingly." This means, of course, that the party claiming rents shall submit the question upon such proof as he may desire or be able to produce, and that, when he has done that and the other party has introduced his proof, the jury shall make due return on the matter in their verdict, and the court shall embrace it in its judgment.

The policy is a wise one, tending as it does to prevent a multiplicity of suits.

Taylor could and should have presented his demand for rents in the former suit. Whether he in fact did so or not is immaterial in this case. If he did, the verdict, failing to find any thing due him, is conclusive against him; if he did not, he is equally concluded by his failure to avail himself of the only remedy the law gives him upon the bond. See *Weigand v. Malatesta*, 6 Cold., 366.

The case under consideration is not controlled by the case of *White v. Bowman*, 10 Lea, 55,

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wherein it was decided that an action at law might be maintained upon an *injunction* bond.

The *certiorari* and *supersedeas* bond, in one and the same instrument, covers both costs and damages, and, under the present law, is not severable; while in case of injunction the costs are covered by a prosecution bond (Code, § 3187) and damages are secured by an injunction bond (Code, § 4439), which is an entirely distinct obligation, and may have different sureties. The liability upon the injunction bond, but not upon the prosecution bond, may be ascertained and enforced by a reference in the injunction suit itself (Code, §§ 4449), or by an independent action at law. 10 Lea, 55.

Reverse and remand.

Chief Justice TURNER, being related to one of the parties, did not sit in this case.

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Sparta v. Lewis.

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## SPARTA v. LEWIS.

(Nashville. March 17, 1892.)

1. SUPREME COURT. *Will not set aside verdict, when.*

Doctrine re-affirmed and explained that Supreme Court will not set aside the verdict of a jury in a civil case upon consideration of the facts alone, if there is any evidence *to sustain the verdict*.

Cases cited: Railroad v. Maloney, 89 Tenn., 332; England v. Burt, 4 Hum., 399; Dodge v. Brittain, Meigs, 84; Tate v. Gray, 4 Sneed, 592.

2. SAME. *Same. What is a civil case within this rule.*

And a suit brought by a municipal corporation before its Recorder to recover of an offender the penalty imposed by its ordinances for assault and battery, is a civil case within the meaning of said rule.

3. REASONABLE DOUBT. *Not applicable, when.*

And upon the trial of such action the plaintiff is not required to make out his case beyond reasonable doubt, but only by a preponderance of evidence.

Cases cited and approved: Hill v. Goodyear, 4 Lea, 233; McBee v. Bowman, 89 Tenn., 132.

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FROM WHITE.

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Appeal in error from Circuit Court of White County. JOHN FITE, J.

E. JARVIS for Sparta.

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Sparta v. Lewis.

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HILL & MITCHELL, M. A. CUMMINGS, and W. J. FERRIS for Lewis.

SNODGRASS, J. On a warrant sued out in favor of the corporation of Sparta, the defendant, Pate Lewis, was brought before the Recorder of that municipality on a charge of assault and battery, which, among other offenses, was one specially punishable by city ordinance, under which he was sued. He was found guilty, judgment rendered against him in favor of the corporation for ten dollars and cost, and he appealed to the Circuit Court. There, after trial before a jury, judgment was rendered in his favor, and the corporation appeals to this court.

Two objections are made here to the judgment and action of the Circuit Court; one that there is great preponderance of evidence against the verdict, and the other that the Court erred in charging the jury that before it could find against defendant it must be satisfied beyond a reasonable doubt of the guilt of defendant or acquit.

The language in which the first proposition—that there is “a great preponderance of evidence against the verdict”—is couched, is quoted from *England v. Burt*, 4 Hum., 399. There, in affirming a judgment, the Court did use the language quoted, that under a line of cases already settling it, this Court would not disturb a verdict approved by a Circuit Judge unless there was a *great* preponderance of evidence against it. The Court did not



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Sparta v. Lewis.

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attempt then to make a rule or to state more than the effect of it. What the "great preponderance" must be it did not suggest in that case, but it referred to a rule already established. That rule was, that the verdict would not be disturbed if there was any evidence to sustain it. *Dodge v. Brittain*, Meigs, 84; Car. Hist. Lawsuit, Sec. 411; *Tate v. Gray*, 4 Sneed, 592.

Afterwards, when the term preponderance was used in this connection, it was put in the form of saying, unless the evidence so overwhelmingly preponderates against the verdict that the Court can see it is clearly wrong; and in some cases other terms have been used; but all these expressions refer to the same rule, and mean the same thing in legal effect and intent, and the rule remains now, as it always has been in this Court, that a verdict will not be disturbed if there is *any evidence to sustain it*. *Railway Co. v. Maloney*, 5 Pickle, 332.

In some recent cases, to the term "any evidence" of the rule has been prefixed the words "material" or "legitimate," "substantial" or "competent;" but these add nothing to it not already implied in its use without them. *Trott v. West*, Meigs, 168.

They tend rather to weaken the strength of the term by addition of unnecessary expletives. It was never decided or thought that any immaterial or illegitimate, unsubstantial or incompetent evidence was sufficient, nor that "*any evidence*" alone was sufficient, but "*any evidence to sustain the verdict.*"

This always meant any competent, material, substantial, connected evidence legitimately establishing the proposition decided, though there might be much or little evidence to the contrary. It did not mean that if there were any evidence of facts tending to establish one element of a proposition proven, the whole proposition of several elements might be regarded as proven, but only that where the evidence made out, as an entirety, a *prima facie* right to a verdict, and the jury so found, it was evidence sufficient to sustain the finding. For the same reason, it never meant that where one or more facts material to be established were established out of several necessary to be proven to sustain a verdict, that the establishment of that one or more by competent evidence, substantial, material, and legitimate, should justify or sustain a verdict, although both these supposed are cases where there is evidence, and material, competent, substantial, and legitimate evidence. But they are not cases where there is evidence "*to sustain the verdict;*" and there must always be this in any case if it is sustained in this Court. When it is sustained, it is not upon the ground that there is "any evidence" in the case, or any material, substantial, competent, legitimate evidence *in the case*, but upon the ground that there is "*evidence which sustains the verdict.*"

The real question in this case is involved in the second objection—that is, whether this case is within the rule as to preponderance of evidence, or must the evidence exclude reasonable doubt.

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Sparta v. Lewis.

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It is argued that the offense is criminal, and that, before the corporation can recover, it must show defendant guilty by the same evidence as if it were a prosecution by the State on presentment or indictment. This view is erroneous. The action is not a criminal prosecution. It is not a trial between the State and defendant, nor on presentment or indictment by and before a jury. If it were, the evidence would have to be entirely satisfactory. But this is in the nature of a suit for debt. It is not a prosecution, but a suing in Court to recover a penalty for the violation of a city ordinance. The case was triable before a Recorder. On appeal it was in fact tried by a jury, it is true, but only as all civil cases are or may be, but not on presentment or indictment. In criminal trials proper, the jury must be satisfied beyond a reasonable doubt of defendant's guilt. There are, too, civil issues as to resulting trusts, etc., and on pleas of justification in slander and libel and other cases, in which positive statute or settled rules of construction, in view of a wise policy, require a given kind or amount of evidence; but this case falls within no exception of the classes indicated. Cases merely involving civil redress for criminal offenses need only to be made out by a preponderance of evidence. Of course the evidence must preponderate after due allowance in defendant's favor of the legal presumption of innocence of crime and proof of good character, when proven; but, after all, it must be, against all

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other evidence and presumptions, but a preponderance. *Hill v. Goodyear*, 4 Lea, 233; *Bowman v. McBee*, 5 Pickle, 132.

The judgment must be reversed, and the case remanded for a new trial.

91 876  
110 887

## INSURANCE COMPANY v. CRUNK.

(Nashville. March 19, 1892.)

1. SUPREME COURT. *Passes upon errors of law, but not upon facts, without motion for new trial.*

Supreme Court will, upon appeal of a law case, pass upon alleged errors of law, but not upon the sufficiency of the evidence to support the verdict, although no motion for new trial was entered in the lower Court, or was there waived by uniting it with motion in arrest of judgment.

Cases cited and approved: Snapp v. Moore, 2 Overton, 236; Wells v. Mosely, 4 Cold., 405; Mumford v. Railroad, 2 Lea, 397; Morgan v. Bank, 13 Lea, 239.

2. FIRE INSURANCE. *Averments in declaration in suit for loss.*

In suit for loss upon fire policy containing the provision that "if the building or any part thereof fall except as the result of fire, all insurance by this policy on such building shall immediately cease," it is not essential that plaintiff aver in his declaration the negative of said provision.

3. SAME. *Construction of exemption clauses in policy. General rule.*

Doctrine re-affirmed and illustrated that ambiguous clauses in a fire policy will be construed most strongly against the insurer and in favor of the indemnity of the insured.

4. SAME. *Construction of exemption clause as to falling of building.*

Under the clause in a fire policy providing that the insurance shall immediately cease "if the building or any part thereof fall except as the result of fire," the insurer is not exempt from liability, where part of the insured building is blown down just before the remainder is destroyed by fire, unless the part blown down constitutes such material and integral part of the whole, that without it the insured property has lost its original and distinctive character.

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Insurance Company v. Crunk.

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5. SAME. *Same. Charge of Court.*

And in a case where parts of an insured building had fallen before the remainder was destroyed by fire, it is not error for the Court, after stating correctly the general proposition construing said clause, to illustrate his meaning by saying to the jury that the case made by certain phases of the evidence was not within the exempting clause. That is no invasion of the jury's province.

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FROM LINCOLN.

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Appeal in error from Circuit Court of Lincoln County. M. D. SMALLMAN, J.

W. B. LAMB and J. D. TILLMAN for Insurance Company.

J. H. HOLMAN & CARTER for Crunk.

SNODGRASS, J. The defendant in error brought this suit against The London and Lancashire Fire Insurance Company to recover for loss sustained by fire, which destroyed his buildings, insured by said company.

The policy contained a clause providing that, "if the building or any part thereof fall except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease."

There was no averment in the declaration that

the building insured and no part thereof fell except as the result of fire, and the defendant demurred because of the failure of plaintiff to make such averment. The demurrer was overruled.

Pleas were filed denying liability, and the case was tried on the merits, resulting in a verdict and judgment in favor of plaintiff for \$1,828.75; and defendant appealed, and assigned errors of fact and law.

Before proceeding to consider such of these as are deemed material for consideration, we notice an objection of defendant in error that plaintiff cannot avail himself of objections assigned, because there were no proper motions made below for a new trial and in arrest of judgment, the entry of record on that subject being that "the defendant moved the Court for a new trial and in arrest of judgment, which *motion* was by the Court overruled," and the point made on it here that this was but one motion, and that a motion for a new trial could not have been entertained at the same time with a motion in arrest, and that a motion in arrest, thus made, waives a motion for a new trial, citing *Snapp v. Moore*, 2 Overton, 236, where this position was taken *arguendo*, but doubtless correctly by Judge Overton, delivering the opinion of the Court.

But in the view we take of it, this is immaterial. It would only affect the right of defendant to object here, as plaintiff in error, that the evidence did not sustain the verdict, because, as to

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Insurance Company v. Crunk.

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errors of law, he needed no motion for a new trial to authorize a correction of errors on appeal. 4 Coldwell, 405; 2 Lea, 397; 13 Lea, 239.

And as there was evidence before the jury to sustain the verdict, it does not matter whether plaintiff in error could not now make the question, because, if he could it would be ineffectual, as the verdict would not be disturbed upon the facts.

Passing this, therefore, we proceed to questions made and deemed essential to be noticed.

The first alleged error is the action of the Circuit Judge on the demurrer.

The declaration was not defective for want of averment omitted. It is not necessary that it should have averred the performance or non-performance of conditions subsequent, nor to have negatived prohibited acts or excepted risks. May on Ins., Sec. 590.

The second and last error we notice here (though all others assigned have been considered and disposed of in consultation of the Court), is as to charge of the Court upon construction and effect of this provision of the policy.

Before the fire destroyed the insured building, it had been visited by a cyclone. It was a two-story building, with a portico in front, and what is designated as an "ell" addition in the rear. This was one story. The roof of the two front upper rooms had been blown away, the rafters, ceiling, and parts of walls remaining.

But there was evidence tending to show that



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before this, some fire had been blown out on the floor by a current of air passing through a room, which was the probable cause of the burning of the building subsequently consumed, after the roof, etc., had been blown away or fallen in upon the fire. This was evidence sufficient to justify the verdict that the fire commenced before the fall of any part of the building. Of course, if it commenced before the fall, though the entire building fell subsequently, the insurance company would be liable. May on Ins., Sec. 401.

The defendant company insisted, however, that the evidence showed that the fire commenced after the roof, etc., were blown away, and there was evidence tending to show this. It also insisted that a window or window-light was first blown out, and through this the air-current had been admitted, which blew fire out into the room, if any was so blown; and hence, a part of the building had fallen before the fire, and the policy ceased, by its terms, before the fire started.

The question thus presented, upon facts and proper construction of the policy, is made in objection to the charge of the Court, which, on this point, was as follows: "The exclusion clause in question is not to be literally understood so as to avoid the policy if an atom or some minute portion of the material in the insured building should fall. It means some functional portion of the structure, the falling of which would destroy its distinctive character as such. So that, if the proof

in this case shows that the roof was blown from a part of one of the buildings mentioned in the policy sued on (there being two buildings in the policy), and one of the upper rooms was uncovered and the walls thereof partially blown away, but leaving more than three-fourths of the building intact, and suitable for a dwelling-house, and that in this condition it was burned, the clause in the policy as to the falling of the building or any part thereof, would not exempt defendant from liability, if otherwise liable, as before explained, unless you should believe, from the proof, that the falling was the direct cause of the fire. If the proof shows that the fire was scattered over the floor in one of the rooms of one of the insured houses by the wind; that some of it ignited the carpet or some of the furniture in the room, and a strong wind blew the roof and a portion of the building upon it, and, after smoldering a time, it broke out and consumed the building; that the wind, and not the falling of the building or a part thereof, caused the fire; that the fire, and not the falling of the building, was the proximate and direct cause of the loss, you should find for plaintiff, if defendant is otherwise liable, as before explained."

Defendant in error objects to this upon several grounds:

*First.*—That it is law only in case of a contract where the condition is as to the "falling of the building" *entire*.

This is an erroneous view. The Circuit Judge

drew the correct distinction. The falling of "any part" of a building in such a contract manifestly could not apply to any minute or fragmentary portion, as it might literally import. If so, the clause would be void as unreasonable, and defeating, without merit, the contract for indemnity. It cannot have such a technical or literal construction. Literalism being disregarded, the clause must have a fair and reasonable interpretation and construction, and that which is most favorable to indemnity—the object of the contract. Not having a literal meaning, and not definitely designating what material part of the building must fall before the fire to exempt the insurer from liability, it must, like all ambiguous clauses, be construed most favorably to indemnity, and against the insurer. It should, therefore, not have been construed as meaning any fragment or portion of a part of the building, but an integral part of the entire building, as was done by the Circuit Judge.

*Second.*—It is next objected to this, that after construing this clause, the Circuit Judge told the jury that if the roof was blown from "one of the rooms," etc., this would not be a falling of any part within the meaning of the policy, and that this was erroneous, because, first, it limited the facts to the blowing off of the roof of *one* room, whereas, the roof of *two* was blown off, etc.

This was error in defendant's favor. It left the jury to infer that if the roof was blown from two rooms, or more damage was done, it might be such

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a falling as the contract contemplated; whereas, in fact, it would not have been, under the proper construction he had already given.

Again, it is said this was an invasion of the right of the jury to determine as a fact what part of the building falling might be within the clause.

This objection is not well taken. The Judge tells the jury what construction the contract must have, and illustrates by stating such a condition as would not be within his meaning or definition or construction. If his construction was right, he was right in eliminating, by statement, such a blowing off of the building as would or would not be within it. It is not telling the jury on a controverted question what the facts were or how to find them; it is a statement to them that certain facts, being true or proven, will not bring the case thus proven or assumed within the construction the Court gives the contract.

On the whole case, we are satisfied with the judgment, and it is affirmed with cost.



CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF TENNESSEE,  
FOR THE  
WESTERN DIVISION.

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JACKSON, APRIL TERM, 1892.

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LOCHEIMER *v.* STEWART.

(*Jackson.* April 7, 1892.)

**BANKRUPTCY.** *Effect of discharge.*

During the interval between the bankrupt's application and discharge, his creditor obtained judgment against him for a debt existing at date of his application, and provable, though never proved, in the bankruptcy proceedings. To the creditor's suit upon this judgment, brought after his discharge, the bankrupt interposed his discharge as a bar.

*Held:* The discharge is an effectual bar to the suit.

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Locheimer v. Stewart.

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Cases cited and approved: *Dick v. Powell*, 2 Swan, 632; *Stratton v. Perry*, 2 Tenn. Ch., 633; 121 U. S., 457.

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FROM MADISON.

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Appeal in error from Circuit Court of Madison County. LEVI S. WOODS, J.

JOHN L. H. TOMLIN and M. B. GILMORE for Locheimer.

W. M. MCCALL and E. L. BULLOCK for Stewart.

SNODGRASS, J. The question in this case is, whether a discharge in bankruptcy can be plead in bar of a suit upon a judgment obtained in a State Court on a claim provable in bankruptcy before the discharge but after commencement of bankrupt proceedings.

The petition in bankruptcy was filed in 1878, but the discharges of defendants Stewart & Oliver were not obtained until 1887-88.

In the meanwhile, on April 30, 1881, Locheimer Bros., creditors of the firm of Stewart & Oliver when bankrupt proceedings were instituted, had taken judgment on their claim (which was one provable in bankruptcy) before a Justice of the Peace.

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Locheimer v. Stewart.

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They brought this suit on that judgment April 27, 1891, before a Justice of the Peace, lost, and appealed to the Circuit Court. The Circuit Judge sustained the plea, and rendered judgment in favor of defendants, and plaintiffs appealed in error.

The judgment is correct. It is in accordance with the holding of this Court in a case arising under the bankrupt law of 1841 (*Dick & Co. v. Powell*, 2 Swan, 632), and with the persuasive view taken by Judge Cooper, on full consideration of authorities, after the bankrupt act of 1867. *Stratton v. Perry*, 2 Tenn. Ch., 633.

The application, correctness, and authority of these cases are earnestly contested by plaintiffs, but the question has been conclusively settled as then held by the Supreme Court of the United States. *Boynnton v. Ball*, 121 U. S., 457 (Law. Co-op. Ed., Book 30, p. 985). In that case, taking jurisdiction of it as a Federal question, the Supreme Court so decided, reversing the judgment of the Supreme Court of Illinois to the contrary.

We concur in the opinion expressed by the Supreme Court of the United States on the merits of the question; but if we did not, we would be constrained to follow it, as that Court exercises in this class of cases a revisory jurisdiction.

Let the judgment be affirmed with costs.



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Walsh v. Crook.

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## WALSH v. CROOK.

(Jackson. April 9, 1892.)

1. COUNTY COURT. *Jurisdiction as to disputed land titles.*

County Court has not jurisdiction to determine disputed land-titles, not even as an incident to the exercise of its undoubted jurisdiction to sell a decedent's lands for payment of debts.

Code construed: § 4982 (M. & V.); §§ 4203, 4204 (T. & S.).

Case cited and approved: Dean v. Snelling, 2 Heis., 484.

2. SAME. *Same. Res adjudicata.*

And its decree in such case does not operate as *res adjudicata* of the matter, although the parties submitted the question without objection to the Court's jurisdiction. The proceeding is *coram non judge*. Jurisdiction cannot be conferred, in such case, by consent of parties.

Code construed: § 5064 (M. & V.); § 4321 (T. & S.).

Cases cited and approved: Nicely v. Boyles, 4 Hum., 177; Whillock v. Hale, 10 Hum., 65; Johnson v. Britt, 9 Heis., 760.

Cited and distinguished: Leverton v. Waters, Thomp. Cas., 278; Leverton v. Waters, 7 Cold., 20; Vincent v. Vincent, 1 Heis., 333; Pardue v. West, 1 Lea, 729.

3. SAME. *Jurisdiction to sell decedent's lands.*

But the jurisdiction of the County Court over a proceeding to sell a decedent's lands to pay debts is not defeated by the fact that a controversy over the title to the lands arises during its course. The Court may, nevertheless, proceed to sell the lands, and the purchaser at such sale will acquire such title, and such only, as belonged to the decedent's estate. Other titles would remain unaffected.

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FROM CHESTER.

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Appeal from Chancery Court of Chester County.  
A. G. HAWKINS, Ch.

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Walsh v. Crook.

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I. F. HUDDLESTON for Walsh.

J. S. WHITE for Crook.

LURTON, J. J. C. Walsh died intestate. The complainant, who is his widow, was qualified as his administrator. She regularly suggested the insolvency of his estate, and filed a report showing that no assets had come to her hands, and that the intestate had left no lands out of which either dower or homestead could be assigned. The defendant, J. A. Crook, filed a claim against the intestate with the Clerk of the County Court, which seems to have been subsequently allowed. Upon the claim thus adjudicated, he filed a petition in the County Court praying a sale of a certain tract of one hundred acres of land for the payment of his debt and those of all other creditors who might come in and prove their claims. This petition charged that the land sought to be subjected had belonged to the intestate, and that the widow was entitled to dower and homestead out of it, and sought to have the remainder subject to such homestead and dower sold for payment of debts. Complainant was made defendant both as widow and as administrator. The heirs at law seem also to have been before the Court by regular process. Complainant answered this petition, and denied that the land sought to be subjected belonged to the intestate at the time of his death, and set up title in herself under a conveyance

from the intestate, and that she had been in possession for more than seven years, claiming and holding for herself under her conveyance. Proof seems to have been taken upon this conflict of title thus presented by this answer. Upon a final hearing, this issue was decided adversely to complainant's title, and the land ordered to be sold subject to a homestead. An appeal seems to have been prayed and granted, subject to execution of cost-bond. Bond was never given, but the pauper's oath tendered the Clerk in lieu of bond. The order not permitting the Clerk to take the oath, he properly refused to file her affidavit. The appeal was, therefore, never perfected.

Before the sale was made, complainant filed the original bill in this record, setting out the facts concerning her title to the land about to be subjected to sale, and the issue made in her answer by which she presented her claim. The theory of the bill was that the decree of the County Court was void, as beyond the jurisdiction of the County Court, in so far as it undertook to adjudge her title bad, and that the decree constituted a cloud upon her title which she sought to have removed. She sought an injunction to restrain any sale until her rights could be adjudged. An injunction was refused, the Chancellor in his fiat stating that he did so because he was of opinion that the County Court had jurisdiction of the subject-matter and of the parties, and had adjudged the title of complainant to be bad. The bill was,

however, filed, though the sale was not stopped. At this sale the defendant became the purchaser of the remainder interest in the land claimed by Mrs. Walsh. After it had been reported and confirmed, a supplemental bill was filed, setting out these facts, and praying to have the title thus obtained canceled as constituting a cloud.

To the original and supplemental bill the defendant interposed a demurrer, relying upon the decree of the County Court adjudging the issue of title against complainant, as *res adjudicata*. This demurrer was sustained, and the bill dismissed.

The estate being insolvent, the jurisdiction of the County Court to subject any lands of the intestate to sale for the payment of debts cannot be doubted. Clearly, the defendant has obtained any title which descended to the heirs; and the fact that the title was disputed in the answer of Mrs. Walsh did not operate to suspend or defeat the jurisdiction of the County Court to sell whatever interest the intestate had in these lands. The jurisdiction of that Court to adjudge a question of conflict of title is a question quite distinct. If the land turns out to be the land of the intestate, the purchaser has acquired it; but if, on the other hand, it shall appear that the intestate had never owned the land, or had conveyed it, or it had been lost by adverse possession, then the purchaser has obtained no title. The County Court has no jurisdiction beyond that expressly conferred by statute. It has never had jurisdiction to try

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Walsh v. Crook.

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and determine conflicting land-titles. This has been repeatedly ruled in partition cases. *Dean v. Snelling*, 2 Heis., 484.

The filing of an answer and the submission of an issue upon conflicting titles will not confer upon that Court a jurisdiction not conferred by statute. *Idem*.

Section 5064, Code (M. & V.), providing that the filing of an answer is a waiver of objection to jurisdiction, applies only to the Chancery Court. This was expressly so ruled in *Dean v. Snelling, supra*. We are no more disposed than our predecessors to extend by construction a jurisdiction which that court is so wholly unfitted to exercise. Section 4982, Code (M. & V.), vests in the County Court all incidental power necessary to the exercise of jurisdiction expressly conferred. It has been urged that if that Court has not the power to decide a question of conflict of titles, that it cannot exercise its undisputed jurisdiction in subjecting lands of the intestate to the payment of debts; that its jurisdiction would be at an end whenever the heirs or any one else chose to intervene and set up a claim to the land sought to be sold. This conclusion by no means follows. The wheels of that tribunal cannot be locked by the mere presentation of such an issue. It may, and should, inquire as to the ownership of the lands it may be asked to sell, and it may decree any lands sold that shall appear from the record to have belonged to the decedent. But its decree

will not operate as an adjudication of any real conflict which may exist, nor will it operate as *res adjudicata* in any subsequent action between the purchaser and one claiming adversely to the title of decedent. Such an adverse claimant may resist the title of the purchaser when sued, or, as in this case, prefer a bill to have his title canceled as a cloud. We are supported in our conclusion as to the effect of such incidental adjudication of conflicting titles by a consideration of the old rule concerning the jurisdiction of the Chancery Court in regard to conflicting titles affected by a decree for partition.

Under that rule, Courts of law were exclusively given jurisdiction in matters involving disputed titles. Originally, it was held that even the filing of an answer did not confer jurisdiction to adjudge a conflict appearing in a partition case, and that a decree of partition could not be relied upon as *res adjudicata* in a subsequent action of ejectment. *Nicely v. Boyles*, 4 Hum., 177; *Whillock v. Hale's Heirs*, 10 Hum., 65; *Dean v. Snelling*, 2 Heis., 489; *Johnson v. Britt*, 9 Heis., 760.

But after the passage of the Act of 1851-52, carried into the Code (M. & V.) as § 5064, the filing of an answer was held to be a waiver of jurisdiction. *Leverton v. Waters*, Thomp. Cas., 278 (S. C., 7 Cold., 20); *Vincent v. Vincent*, 1 Heis., 333.

But, as we have already seen, this act operated only to confer jurisdiction by consent upon the Chancery Court. Concerning the Chancery Court,

it may be well to observe that, since the extension of the jurisdiction of that Court by the Act of 1877, all question of the power of that Court to determine conflicting titles has been removed. The question presented by this bill and the demurrer is not one as to the power of the Chancery Court to review a decree of the County Court. No such power exists. *Pardue v. West*, 1 Lea, 729.

The County Court had no jurisdiction to adjudge the claim of title set up by Mrs. Walsh; hence the decree, so far as it is sought to be set up as *res adjudicata*, is a nullity. The demurrer should have been overruled. The heirs of J. C. Walsh were not necessary parties. The sale operated to pass their title to the defendant purchaser.

Reverse and remand for answer.

## RAILROAD v. BARNHILL.

(Jackson. April 12, 1892.)

1. RAILROADS. *Residence. Garnishment.*

A railroad corporation that owns and operates under one management a continuous line through this and two other States, having separate charters from each of the three States—that obtained in Tennessee being the youngest—is a resident and domestic corporation of this State, and subject, as such, to suit and garnishment in the Courts of this State.

Cases cited: 104 U. S., 5; 13 Pet., 520; 107 U. S., 581.

2. SAME. *Same. Same.*

And such corporation is subject to garnishment by a citizen of this State in the Courts of this State, although the debt sought to be reached is due to a non-resident, and contracted in one of the other States where the company is chartered.

Code construed: §§ 3536 *et seq.* (M. & V.); §§ 2831 *et seq.* (T. & S.).

Cases cited and approved: Holland v. Railroad, 16 Lea, 414; Railroad v. Walker, 9 Lea, 480.

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FROM McNAIRY.

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Appeal in error from the Circuit Court of  
McNairy County. LEVI S. WOODS, J.

J. M. BOONE for Railroad.



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Railroad v. Barnhill.

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J. T. BARNHILL, and STOVALL & HERRING for Barnhill.

CALDWELL, J. This is a garnishment proceeding, by which J. T. Barnhill seeks to recover from the Mobile and Ohio Railroad Company, as garnishee, the sum of \$50.60, due from it to his debtor, J. J. Joyner.

The Circuit Judge tried the case on an "agreed statement of facts," and rendered judgment in favor of Barnhill. The railroad company appealed in error.

In its answer, the railroad company admits that it is indebted to Joyner in the sum of \$52.60, but denies that it is subject to garnishment in the State of Tennessee for that indebtedness.

The facts upon which the defense is made are as follows: That the Mobile & Ohio Railroad Company was chartered originally by the State of Alabama, then by the State of Mississippi, and then by the State of Tennessee; that the indebtedness of the company "to Joyner is for labor performed wholly within the State of Mississippi," and under contract made in that State, and that he is a citizen of that State.

Barnhill is a resident of Tennessee; and the garnishment process, which is in due form, was regularly served on the station agent of the railroad company at Ramer, in McNairy County, this State.

From these facts the argument is made that

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Railroad v. Barnhill.

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the railroad company, as well as Joyner, is a non-resident of Tennessee and a resident of Mississippi, as to the subject-matter of this litigation, and that therefore the Courts of this State have no jurisdiction to render judgment against it for the debt in question.

It is true, as a general rule, that a non-resident cannot be charged as garnishee; but it is not true that the railroad company is to be treated, in this case, as a non-resident. In reality it is not a non-resident, but a resident of Tennessee. It exists and performs its functions within our territorial limits as a domestic corporation, by virtue of a charter granted by the Legislature of this State. Acts 1847-48, Ch. 118.

That the same incorporators obtained earlier charters from the States of Alabama and Mississippi, and effected an organization and still do business thereunder, does not render the corporation any less a resident of Tennessee.

It is well settled that a corporation created and organized under the laws of a particular State has its legal residence in that State, and that it cannot change its citizenship by doing business in another State. *Baltimore and Ohio R. R. Co. v. Koontz*, 14 Otto, 5.

"It must dwell in the place of its creation, and cannot migrate to another sovereignty." *Bank of Augusta v. Earle*, 13 Peters, 520.

Yet different charters for the same general business may be granted by different States to the

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Railroad v. Barnhill.

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same incorporators; and when that is done, and organization is properly effected under each charter in succession, the corporation becomes a citizen of each State, and, as such, has the protection of and is amenable to her laws. *Memphis and Charleston Railroad Company v. State of Alabama*, 107 U. S., 581.

The fact that the indebtedness of the railroad company to Joyner arose in Mississippi, under a contract made in that State, does not render the railroad company a non-resident of Tennessee as to that indebtedness. The contention to the contrary, and that the railroad company is a non-resident of this State as to that debt, is not sustained by the case of *Memphis and Charleston Railroad Company v. State of Alabama*, 107 U. S., 581.

The decision in that case was that the railroad company was a citizen of both Tennessee and Alabama, having been chartered in each State; and that, being a citizen of Alabama, it could not, upon the ground of citizenship in Tennessee, remove into the Circuit Court of the United States a suit brought against it in a State Court of Alabama by another citizen of Alabama.

It was *not* there decided, as here contended, that, for the purposes of that litigation, the corporation was to be treated as not a citizen of Tennessee because the matters involved arose in Alabama. The ground of that decision was corporate citizenship in Alabama, the Court holding that the corporation was a citizen of that State as

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Railroad v. Barnhill.

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well as of Tennessee, where it obtained its first charter.

The Mobile & Ohio Railroad Company, as already stated, was chartered and is doing business in Alabama, Mississippi, and Tennessee. It is, therefore, in fact and in law a citizen of each of these States.

Whether the debt here involved was created in this State or in the State of Mississippi, is a question which cannot affect the citizenship of the corporation in Tennessee, or the jurisdiction of the courts of this State to render proper judgment against it as garnishee in this case.

Nor does the non-residence of Joyner, the creditor of the railroad company and debtor of plaintiff below, defeat or preclude the jurisdiction of our Courts. Clearly, Joyner himself could have come into Tennessee and maintained his suit here against the railroad company for its indebtedness to him. He could have obtained jurisdiction of the corporation by service of process upon its proper officer or agent in this State. Code, §2831 *et seq.* That being so, it would seem to follow that his creditor can by service upon the same person bring the corporation before the Court, and there have the same question of liability adjudged.

Even as against a foreign corporation doing a regular business in this State, the present proceeding would be within the rules of procedure laid down in a recent work of high standing. The language of the work referred to is as follows:

“The question of the liability of foreign cor-

porations to garnishment differs little from that of natural persons domiciled in another jurisdiction, in so far as the course of business of certain classes of corporations has occasioned the enactment of special statutes in most of the States, giving Courts jurisdiction of such bodies when engaged in the prosecution of their business in States other than that of their residence.

“Except, therefore, in those States where it is held that corporations are in no event subject to garnishment, a foreign corporation may be charged as garnishee in all cases where an original action might be maintained against it for the recovery of the property or credit in respect to which the garnishment is served. In some of the States this rule obtains through the construction of statutes *pari materia*, and in others by express provision. Generally, the jurisdiction of the Court in such cases is based upon a statute providing for the commencement of suits against foreign corporations when engaged in doing business within the State, by service upon some officer or agent of the company resident there or that may be found within the jurisdiction.” 8 Am. and Eng. Ency. of Law, 1131, 1132.

In this State there is just such a statute as that referred to in the last sentence above. Code, §§ 2831 to 2834a inclusive. It comprehends both domestic and foreign corporations. *Railroad Company v. Walker*, 9 Lea, 480; 16 Lea, 418.

In any and every aspect of the case at bar the

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Railroad v. Barnhill.

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plaintiff in error is subject to be charged as garnishee.

The same question, upon very similar facts, came before this Court in *Holland v. Mobile and Ohio Railroad Company*, 16 Lea, 414. The conclusion reached in that case was the same as that reached in this. A mere citation of that case would have been sufficient for the purposes of this one but for the fact that counsel has questioned the soundness of the decision there made, and asked to have the question re-examined.

Believing it to be entirely sound, we adhere to the ruling made in that case. In the conclusion of the opinion, the Court, speaking through Judge Cooper, said: "All of the authorities agree, therefore, that in the case of a railroad corporation chartered by two or more States the corporation may be garnished in each State for wages due by it to its employes. Drake on Attachments, Sec. 879; 1 Rorer on Railroads, Sec. 720." 16 Lea, 418.

Affirmed with costs.

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Howell v. Jones.

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## HOWELL v. JONES.

(Jackson. April 19, 1892.)

1. HOMESTEAD. *Does not attach to a reversionary interest.*

Homestead does not attach to a reversionary interest in land. The claimant of homestead must have the right of present occupancy, though it is not essential, since Act 1879, that he have actual occupancy of the land to entitle him to homestead.

Cases cited and approved: Jackson v. Shelton, 89 Tenn., 88, 89; Arnold v. Jones, 9 Lea, 548; Fauver v. Fleenor, 13 Lea, 622; Flatt v. Stadler, 16 Lea, 371; Roach v. Hacker, 2 Lea, 633; Henry v. Wilson, 9 Lea, 176; Rhea v. Rhea, 15 Lea, 527; Apple v. Apple, 1 Head, 348.

2. SAME. *Widow's right dependent upon husband.*

Unless the husband had the right of homestead in lands at his death, his widow can have none.

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FROM WEAKLEY.

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Appeal from Chancery Court of Weakley County.  
H. J. LIVINGSTON, Ch.

CHARLES M. EWING for Jones.

J. W. THOMAS for Howell.

LURTON, J. The question presented in this record is as to whether a widow is entitled to home-

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Howell v. Jones.

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stead in property owned by her deceased husband, but which, at the time of his death, was in the actual occupancy of the widow of his father, it having been assigned to her as a homestead. Can there be two homesteads in the same land at the same time? Under our Act of 1879, it is not essential to the right of homestead that the claimant should be in the actual occupancy. So may a homestead be assigned in an estate for life. 9 Lea, 548. By express statute it exists in equitable estates. 13 Lea, 622. But a homestead is not an estate in land but a right of occupancy. 13 Lea, 622; 16 Lea, 371. The debtor's lands may be sold subject to this right of homestead, or the reversion sold as such. 2 Lea, 579; 16 Lea, 371.

The right under our statute, as construed by our predecessors, is neither more nor less than a right of use or occupancy, which cannot be conveyed except in the manner provided by the Constitution, and is exempt from the demands of creditors.

Before the Act of 1879, actual occupancy was essential to the claim of homestead. 2 Lea, 633; 9 Lea, 176. Since that Act actual occupancy is not essential. 15 Lea, 527. But, being a mere exemption of a right of occupancy, the right of personal occupancy is essential to the existence of the homestead. The exemption is one in favor of the husband. If none existed in his favor, none passed to his widow.

The lands in which Mrs. Jones has been as-



signed homestead, were lands in which her husband had no homestead exemption, by reason of the fact that the widow of his father was in possession under her own homestead exemption. The right of her husband was in the remainder, and he had no right of present occupancy. He owned and occupied a wholly different tract of land. His right of homestead was, therefore, limited to the land in which he had a present right of occupancy. His widow had no right superior to that of her husband. We are, therefore, of opinion that a right of homestead does not exist in a reversionary interest.

This is clearly the conclusion from the decision in *Jackson, Orr & Co. v. Shelton*, 89 Tenn., 88, 89, and is the rule applicable to dower. *Apple v. Apple*, 1 Head, 349. The County Court erred in assigning homestead out of the lands subject at the death of Mrs. Jones' first husband to the homestead of the widow of his father. She was entitled, however, to homestead in the tract owned and occupied by her husband.

Reverse and remand for a re-assignment. Jones and wife will pay all costs accrued to this decree.

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Stout v. State.

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STOUT v. STATE.

(Jackson. April 19, 1892.)

CRIMINAL PRACTICE. *Liability of counties for costs in felony cases.*

Chapter 22, Acts 1891 (Extra Session), providing that counties shall pay the costs in felony cases where they are disposed of without final trial, has no application to felony cases in which the indictment was found before the passage of the Act.

Act construed: Acts\* 1891 (Ex. Sess.), Ch. 22.

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FROM WEAKLEY.

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Appeal in error from Circuit Court of Weakley County. W. H. SWIGGART, J.

CHARLES M. EWING for Stout.

Attorney-general PICKLE for State.

CALDWELL, J. On June 4, 1891, Sam Stout was indicted for larceny. In due course of time he was tried and convicted. Upon appeal in error to

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\* This Act became a law September 19, 1891. It was construed by an oral opinion, delivered at last term, at Nashville, in *Caswell v. State*, and held to render the counties liable for costs of felony cases (1) when *nolle prosequi* is entered; (2) when grand jury ignore the indictment; (3) when case is retired; (4) when case is dismissed by Justice of the Peace on preliminary trial.—REPORTER.

the present term of this Court, the judgment of the Circuit Court was, on a former day, reversed and a *nolle prosequi* entered by the State.

The case is now before us on the motion of the Attorney-general, and we are asked to determine whether the State or the county shall pay the costs accrued on behalf of the State.

Under the Code (§ 5585, subsec. 2, and § 5586), they were taxable to the State, the offense charged being punishable "by confinement in the penitentiary." By Secs. 1 and 2, Ch. 22, Acts 1891 (Extra Session), that provision of the Code was so amended and changed as to make the county liable for such costs in such a case. That act was passed and approved on September 19, 1891, and took effect "from and after its passage."

Which of the two statutes applies to this case, the indictment having been found *before* the passage of the amendatory Act, and the *nolle prosequi* having been entered *afterward*?

The intent of the Legislature does not very clearly appear. Yet, we are of opinion that the recent Act contemplates only such prosecutions as may be commenced after its passage, and that cases then pending are not embraced within its provisions. This construction gives the Act prospective effect only. A different construction would render it retrospective, in part at least.

The costs in this case are, therefore, taxable under the Code provisions.

## EPPERSON v. ROBERTSON.

(Jackson. April 22, 1892.)

1. BANKRUPTCY. *Assignee's rights. Attached property.*

An assignee in bankruptcy takes the bankrupt's property subject to all equities, liens, powers, and incumbrances existing against it at commencement of the bankruptcy proceedings, except so far as these are defeated or modified by express provisions of the bankrupt Act. Attachment of the bankrupt's property "on mesne process, \* \* \* made within four months next preceding the commencement of the bankruptcy proceedings," is dissolved by express provisions of the bankrupt Act.

Act construed: U. S. Rev. Stat., § 5044.

Cases cited: 95 U. S., 764; 101 U. S., 731; 104 U. S., 232.

2. SAME. *Lien not dependent on mesne process, when.*

Bankrupt's creditor, without judgment at law, filed bill "within four months next preceding the commencement of the bankruptcy proceedings" to set aside fraudulent conveyance of bankrupt's realty, and subject same to payment of his debt. The bill prayed for attachment, which was issued and levied upon the lands therein described. These lands passed to the assignee in bankruptcy, and were sold by him.

*Held:* The bankrupt's creditor had secured lien on these lands by the filing of his bill, and independently of the levy of the attachment, and that this lien was not dependent on mesne process, and therefore not defeated by the bankruptcy proceedings and sale.

Code construed: § 5031 (M. & V.); § 4288 (T. & S.).

Cases cited and approved: Peacock v. Tompkins, Meigs, 317; August v. Seeskind, 6 Cold., 167; House v. Swanson, 7 Heis., 32; Brooks v. Gibson, 7 Lea, 271; Nailor v. Young, 7 Lea, 738; Cowan v. Dunn, 1 Lea, 68.

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Epperson v. Robertson.

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3. SAME. *Waiver of benefit of discharge.*

At commencement of bankruptcy proceedings, a suit was pending against the bankrupt by his creditor to set aside fraudulent conveyance of lands. These lands were sold by the assignee in course of the bankruptcy proceeding, and purchased by the bankrupt himself. After his discharge, the bankrupt appeared in said cause and promised to pay the debt sued for. Thereupon decree was entered against him for the debt and for sale of the land. From this decree there was no appeal.

*Held:* Decree is not void, but conclusive upon the bankrupt on collateral attack.

4. STATUTE OF LIMITATIONS. *Ten years. Judgments and decrees.*

Only final judgments and decrees fall within the operation of the statutes of limitations. Hence, the enforcement of a decree for a debt, and sale of land to satisfy it, is not barred by a delay of ten or more years in its execution, the cause remaining in Court during that interval.

Code construed: § 3473 (M. & V.); § 2776 (T. & S.).

Cases cited and approved: *Ex parte Spence*, 6 Lea, 391; *Gold v. Bush*, 4 Bax., 579; *Tyner v. Fenner*, 4 Lea, 469.

5. SAME. *Seven years.*

In suit to set aside fraudulent conveyance, seven years' possession of the land during the pendency of the suit by the debtor, under color of title, cannot defeat the creditor's right to have the lands sold for his debt.

Code construed: § 3459 (M. & V.); § 2763 (T. & S.).

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FROM MADISON.

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Appeal from Chancery Court of Madison County.  
A. G. HAWKINS, Ch.

HAYNES & HAYS for Epperson.

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Epperson v. Robertson.

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McCORRY & BOND, E. L. BULLOCK, and JOHN L. BROWN for Robertson.

LURTON, J. This bill was filed for the purpose of enjoining the execution of a decree of the Chancery Court in favor of the defendants, and against the present complainant. The defendants were creditors of complainant, and, as such, filed their bill in equity, under Code (M. & V.), § 5031. This bill described four several tracts of land, being the same about to be sold under the decree now attacked, and charged that they had been fraudulently conveyed to one Coles, who was joined as a defendant. The prayer of the bill was, that the lands so described be attached, and that, on final hearing, they have judgment and decree upon their several debts, and that the sale to Coles be declared fraudulent—as intended to defeat creditors—and the lands sold for the satisfaction of their decrees. An attachment did issue, and was levied. Upon final hearing, January 27, 1879, the Court pronounced a decree in favor of the complainants in that bill, and directed that the lands so fraudulently conveyed be sold for the satisfaction of the debts found to be due.

This decree has never yet been executed, but from term to term was revived and renewed, the delay being clearly due to the urgent requests and entreaties of complainant. When at last it was about to be executed, the sale advertised by the Master in Chancery was enjoined by this bill.

The creditors obtaining these judgments subsequently assigned them to the defendants, Carter Bros. & Co., who have filed their answer as a cross-bill, and ask to have the decrees revived in their names, and to have the sale enforced for their benefit. Upon the pleadings and evidence, the Chancellor dismissed the original bill, and gave a decree upon the cross-bill according to its prayer. Complainant Epperson has appealed from the whole decree. The grounds relied upon in argument in support of the relief sought by complainant will be considered separately, but in such order as is most convenient, rather than as presented by the assignment of errors.

Within four months after the filing of the bill of Robertson & Botts and others, the defendant thereto, R. H. Epperson, became a voluntary bankrupt, and in December, 1876, received his final discharge. The lands attached were sold by his assignee in bankruptcy, without any order or decree of Court, and purchased by him February 9, 1877. He now insists that the effect of his bankruptcy was to discharge the attachments; that the land passed to his assignee in bankruptcy freed from any incumbrance; and that, by the purchase from the assignee, he has been re-instated in the title, and now holds the property unincumbered by the attachment proceeding theretofore begun against him.

An assignee in bankruptcy takes the property of the bankrupt in the precise situation in which it was at the commencement of the bankrupt pro-

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Epperson v. Robertson.

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ceedings, and subject to all the equities, liens, powers, and incumbrances existing against the property, except in so far as the bankrupt Act, by express provision, has avoided them. *Yeatman v. New Orleans Savings Institution*, 95 U. S., 764; *Stewart v. Platt*, 101 U. S., 731.

By the fourteenth section of last bankrupt Act, it was provided that upon the appointment of an assignee, and on the assignment to him of the bankrupt's property and estates, the "assignment shall relate to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estates, both real and personal, shall vest in said assignee, although the same is then attached on *mesne* process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings." The property in controversy had been attached within four months of the commencement of the proceedings in bankruptcy. If the lien sought to be enforced under the decree of 1879, depended upon the attachments which had been levied, a very serious question would be presented for solution. The undoubted effect of the commencement of the proceedings within four months, would be to dissolve the attachment liens, thereby enabling the assignee to take the property unincumbered by any such lien. Another consequence would probably be that the purchaser from the assignee would acquire a title superior to that of a purchaser



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under a decree subsequently entered enforcing the lien of the dissolved attachments. *Conner v. Long*, 104 U. S., 232.

But that is not this case. The lien of the creditors under the proceeding in question did not depend upon nor result from the attachment.

The decree of January 27, 1879, adjudges that the complainants, "by the filing of their bill herein, have acquired a lien upon said property, which is specifically set out in the bill herein."

By § 5031 of the Code, "any creditor, without first having obtained a judgment at law, may file his bill in chancery for himself, or for himself and other creditors, to set aside fraudulent conveyances of property or other devices resorted to for the purpose of hindering and delaying creditors, and subject the property, by sale or otherwise, to the satisfaction of the debt."

By the next section it is provided that writs of attachment or injunction *may* be granted on giving bond, with security, in such sum as the Chancellor may order.

That bill was filed under the section quoted, and the attachment issued by virtue of the next. The attachment was not essential. It operated only to impound the property and prevent further incumbrance or transfer. The creditors acquired a lien from the filing of the bill, which could only be defeated by failure to establish the existence of their debts or the fact of fraud. This has been repeatedly decided, beginning with *Peacock v.*

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*Tompkins*, Meigs' Reports, 317, and followed and reiterated in a number of subsequent cases, only a few of which need be cited: *August v. Seeskind*, 6 Cold., 167; *House v. Swanson*, 7 Heis., 32; *Brooks v. Gibson*, 7 Lea, 271; *Nailor v. Young*, 7 Lea, 738; *Cowan v. Dunn*, 1 Lea, 68.

In *Brooks v. Gibson*, *supra*, it was expressly decided that a creditor filing such a bill and taking no attachment was entitled to priority over a creditor who filed a later bill, but sued out an attachment. The bankrupt Act only affected "attachments on *mesne* process." *Mesne* process means intermediate, intervening process. The term is a technical one, and, as used in the Act, would seem to require its obvious technical meaning. It has not been defined by the United States Supreme Court in any case to which we have been referred. In the absence of any construction of this phrase by that Court, we must construe it for ourselves. The lien declared and enforced by the decree of 1879 was not a lien resulting from the attachment. It was an equitable lien, and not a consequence of any attachment under *mesne* process. It was, then, not affected or dissolved by the bankrupt proceedings.

This principle has been twice decided in reported opinions by this Court—*House v. Swanson*, 7 Heis., 32, and *Cowan v. Dunn*, 1 Lea, 68. It is true that the bills in those cases had been filed under § 5026 of the Code, and that by § 5029 a lien is declared to exist from the filing of such bills.

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Epperson v. Robertson.

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But this was but a statutory declaration of a well-recognized equitable lien. Meigs' Rep., 317; 7 Lea, 271.

It follows that the assignee took this property subject to this equitable lien, and that he sold subject to this lien. He might have made himself a party to the chancery cause and contested the debt or the fact of fraud or the question of lien. If he succeeded, his title would have been unincumbered so far as that lien was concerned. He did not do so. His sale was, therefore, subject to the pending litigation, and the purchaser stands in his shoes.

But upon another and independent ground we reach the same result as to this property. The defendant in that suit, after his discharge in bankruptcy, and in January, 1878, came into Court, and on the record confessed his "willingness to pay said debts, \* \* \* and that he has, since his proceedings in bankruptcy began, and since his discharge therein, and doth now, promise to pay the same." A year thereafter the decree now assailed was entered. At the date of each of these decrees he was a discharged bankrupt, and had already re-acquired the title to the property upon which the lien was declared. Independently of any question as to the effect of his bankruptcy upon the lien, resulting from the filing of the bill; and assuming that the lien had been dissolved and defeated by the commencement of his proceedings in bankruptcy, yet that Court, having jurisdiction of

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the subject-matter and of the parties, adjudged, upon his own admission of indebtedness, that the complainants in that cause had a lien from the filing of their bill, and were entitled to enforce same by a sale. As before stated, the purchaser at the assignee's sale was the defendant in the pending suit. It may have been error to hold that the complainants therein had a lien, and were entitled to enforce same by a sale. But, obviously, the decree was not void. If erroneous, his only remedy was by resort to some appellate proceeding.

The next defense to be considered is that arising upon the plea of the statute of limitations of ten years barring actions upon judgments and decrees. Manifestly this statute applies only to final judgments and decrees. It cannot operate upon interlocutory decrees, or we should have the extraordinary spectacle of the earlier decrees in a prolonged litigation becoming barred before the rendition of a final decree at the termination of the litigation.

The decree ordering sale of this land was not final in such sense as to have entitled the defendants, as matter of right, to an appeal until after the sale therein ordered had been made. Code (M. & V.), § 3874; *Abbott v. Fogg*, 1 Heis., 742; *Gibson v. Widener*, 85 Tenn., 16.

The Chancellor, under the statute cited, might, in his discretion, have granted an appeal before the sale; but he was not required to do so, the decree not being final. The Court did not lose

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its jurisdiction over the cause, but retained it for the purpose of enforcing its decree subjecting this property to the satisfaction of the debt it had found to be due the complainants therein. Until this sale should be made and the purchase-money collected and disbursed, it was a pending cause.

Where lands were sold under a decree of the Chancery Court, and a lien retained to secure purchase-money, it was held that a subpurchaser was not protected by the statute of limitations against the enforcement of the lien. Judge McFarland, in that case, said as to such defense:

“The *lis pendens* is notice to such a purchaser, and he takes subject to the jurisdiction and power of the Court to dispose of it, or make such decrees in regard to it as it might have done had he not purchased, and that without notice of his purchase. The Court having acquired jurisdiction of the cause in the first instance for the sale of the property, still retains it for the purpose of enforcing its decrees for the payment of the purchase-money.” *Spence, ex parte*, 6 Lea, 391.

Upon the same ground, that the statute will not run against a right in litigation, it was held that the statute did not apply to the sureties upon the bond of an administrator appointed in the Chancery Court. Such sureties were held to be *quasi* parties to a pending suit, and therefore not protected. *Gold v. Bush*, 4 Bax., 579.

So the parties to a note executed to the Clerk in a pending cause were held to be *quasi* parties,

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and not within the protection of the statute. *Tyner v. Fenner*, 4 Lea, 469.

Here the plea of ten years is set up, not by a stranger, who, pending the litigation, had purchased the lands sought to be subjected, but by the defendant himself. Clearly a party to such a pending suit cannot rely upon the statute to obstruct the execution of such a decree. Whether laches in the enforcement of the lien declared in such a decree would be a good defense when interposed by a stranger who had purchased *pendente lite* need not be discussed.

The complainant who now sets up and relies upon the delay in the execution of the decree of sale, is in no situation to complain. This delay has been, as is clearly shown, at his own request and for his own benefit.

The plea of the statute of seven years is also interposed. This rests upon the ground that complainant has been in possession, claiming and holding for himself, under the deed of his assignee in bankruptcy, for a period of seven years. This defense must fail for the reasons already stated as applying to the statute of ten years.

There is no error in the decree, and it must be affirmed.

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Fisher v. Baldrige.

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FISHER v. BALDRIDGE.

(Jackson. April 23, 1892.)

1. FORCIBLE ENTRY AND DETAINER. *Two Justices may grant writs of certiorari and supersedeas in.*

Two Justices of the Peace have authority to grant writs of *certiorari* and *supersedeas* for removal of a case of forcible entry and unlawful detainer from the Justice's to the Circuit Court, at any time within twenty days after the rendition of the Justice's judgment therein.

Code construed: §§ 3842, 3843, 4093 (M. & V.); §§ 3126, 3127 (T. & S.).

Cases cited and approved: *Earl v. Rice*, 10 Ver., 233; *Vanleer v. Johnston*, 8 Ver., 163.

2. REPEAL OF STATUTES. *By implication not favored.*

Repeals of statutes by implication are not favored. Repugnancy between two statutes must be plain and unavoidable in order that the later repeal the earlier by implication.

*Example:* The statutes permitted two Justices, within twenty days after the Justice's judgment, and Judges and Chancellors, at any time before execution of writ of possession, to grant writs of *certiorari* and *supersedeas* for removal of forcible entry and detainer cases from the Justice's to the Circuit Court. An Act was passed requiring *Judges* to grant such writs within thirty days after the Justice's judgment.

*Held:* This last Act did not repeal the statute permitting Justices to grant such writs within twenty days after judgment.

Act construed: Acts 1869-70, Ch. 64.

Case cited and approved: *Frazier v. Railway Co.*, 88 Tenn., 138.

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FROM GIBSON.

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Appeal in error from Circuit Court of Gibson County. JOHN R. BOND, J.

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Fisher v. Baldrige.

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NEIL & DEASON for Fisher.

COOPER & HARWOOD for Baldrige.

LURTON, J. This action was for unlawful detainer. It was begun before a Magistrate. There was judgment for the plaintiff. The defendant applied for and obtained writs of *certiorari* and *supersedeas*, removing the case to the Circuit Court. Upon motion, the petition was dismissed, because granted by two Justices of the Peace. This was error. By Code (M. & V.), § 3843, "two Justices of the Peace may, within twenty days after judgment, grant a *certiorari* and *supersedeas* to remove the proceedings of a Justice of the Peace to the Circuit Court." By Code (M. & V.), § 4900, subsec. 8, power is, in general terms, conferred upon Justices. These provisions have been construed as extending to cases of forcible entry and unlawful detainer. *Earl v. Rice*, 10 Yer., 233.

The contention is, that, by the Act of 1869-70, Ch. 64, carried into the compilation of Milliken and Vertrees as § 4093, the power to grant writs of *certiorari* and *supersedeas* in cases of forcible entry or unlawful detainer is limited and confined to the Judges of the State. The section, supposed by implication to take from Justices of the Peace this power, reads as follows: "The proceedings in such actions may, within thirty days after the rendition of the judgment, be removed to the Circuit Court by writs of *certiorari* and *supersedeas*,



which it shall be the duty of the Judge to grant upon petition, if merits are sufficiently shown," etc. The argument is, that a Justice is not a Judge, and that, by this Act, none but a Judge may grant such writ. This does not necessarily follow.

By the Code, as it stood before this amendment in 1869, either party might take such a cause into the Circuit Court upon writ of *certiorari*, at any time before the writ of possession was executed. Code (T. & S.), § 3862.

But Justices of the Peace could not grant such writ unless application was made within twenty days after judgment. If a longer time had elapsed, the application was to be made to a Judge who, by the Code, could grant the writ in any civil case other than one of forcible entry or unlawful detainer at any time, and in the excepted class at any time before actual execution of the writ of possession. Code (T. & S.), § 3842.

The amendment *limits* the power of the Judge in granting such writ to a time within thirty days after judgment. It has no necessary effect upon the authority of two Justices to grant the writ if applied for within the shorter time permitted by the section of the Code relating to the power of Justices.

The jurisdiction of Justices in this regard is not necessarily affected by the amendment. Repeals by implication are not favored. The repugnancy between two Acts must be plain and una-

voidable to justify a repeal by implication. *Railroad v. Frazier*, 88 Tenn., 138, and cases cited.

The inconveniences and hardships resulting from the hasty execution of writs of possession on Justices' judgments in this class of cases, and the inconvenience of reaching a Judge within the time required before issuance of such writs, led to the granting of power to Justices to grant writs of *certiorari* and *supersedeas*. *Vanleer v. Johnston*, 8 Yer., 163.

While some of these inconveniences have been in part removed by improved facilities for rapid travel and by the increase in the number of Judges and Chancellors, yet many of them remain, and some of the hardships resulting from the speedy dispossession of an occupant have been increased by the late legislation permitting issuance of writs of possession, notwithstanding an appeal has been granted from the judgment of the Justice in such causes.

A due consideration of these inconveniences, together with the fact that there is no necessary repugnancy between the amendatory Act and the Act conferring the power on Justices in such cases, leads us to reverse the judgment of the Circuit Judge, and remand the cause for trial upon the merits.

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 Denning v. Todd.
 

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## DENNING v. TODD.

(Jackson. April 23, 1892.)

1. ADMINISTRATION. *Whether necessary or not. Quere.*

Can next of kin of an intestate recover the personal assets of his estate from a party wrongfully holding and wasting them without appointment of an administrator, there being no debts against the estate? The Court passes over this question without expressing an opinion upon it.

Cases cited: Thurman v. Shelton, 10 Yer., 383; Brown v. Bibb, 2 Cold., 439; Brandon v. Mason, 1 Lea, 628; Christian v. Clark, 10 Lea, 630; Trafford v. Wilkinson, 3 Tenn. Ch., 451.

2. ADMINISTRATOR AD LITEM. *When appointed by Chancery Court.*

A contest arose between the estates of A and B over certain personal assets. D., the executor of B's estate, having taken possession of these assets, was sued by A's next of kin therefor. This suit was dismissed upon demurrer assigning that only A's personal representative could maintain such suit. Then D. became administrator of A's estate, being already executor of B's estate. Thereupon A's next of kin presented their affidavit, during the same term at which demurrer had been sustained, averring the foregoing facts, and that D. had become administrator of A's estate, and was using that position to aid B's estate in wrongfully holding said assets, and praying appointment of administrator *ad litem* on A's estate.

*Held:* The Chancellor should, upon these facts, have appointed an administrator *ad litem*; that the practice of presenting the matter by affidavit was a proper one; and that the application, though made after dismissal of bill on demurrer, did not come too late, being made at same term.

Acts construed: Acts 1889, Ch. 137.

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 FROM CARROLL.
 

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Appeal from Chancery Court of Carroll County.  
A. G. HAWKINS, Ch.

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Denning v. Todd.

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H. C. TOWNS, M. L. MCKENZIE, and H. C. BREWER for Denning.

CHARLES M. EWING for Todd.

CALDWELL, J. This is a bill for the distribution of a dead man's personal estate among his children.

Complainants allege that A. J. Denning died intestate, in Carroll County, on December 2, 1889; that he left certain personal property; that he owed no debts, and, therefore, administration had not been granted on his estate; that he had been twice married, and left surviving him his second wife and several children by each marriage; that his widow died, testate, on March 11, 1891; that S. W. Dunlap, her executor and son-in-law, had wrongfully taken charge of the personal property of which A. J. Denning died the owner, and assumed to sell the same as the property of his testatrix, when, in fact, no part of it belonged to her; that this sale was on time to various persons, and the purchase-money had not yet been paid; that Dunlap had, by the sale, been guilty of a conversion; that he had given no bond and was insolvent.

The bill was filed on May 8, 1891, by some of the children of A. J. Denning, deceased, against his other children, the executor of his widow, and the purchasers of property alleged to have been wrongfully sold by him.

The prayer is for injunction to restrain the

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executor from receiving and the purchasers from paying to him the price of the property so sold; for a proper reference and decree upon the facts alleged; and, finally, for a decree distributing the personal assets of A. J. Denning, deceased, among his children, and for general relief.

Dunlap, the executor, and several other defendants demurred to the bill, upon the ground, as claimed by them, that such a bill could be maintained only by a personal representative of A. J. Denning, deceased.

The Chancellor was of opinion that the demurrer should be sustained and the bill dismissed; but, before his decree was entered, complainants moved the Court to appoint Elijah Denning, one of the complainants, administrator *ad litem*, to the end that he might, in his representative capacity, become a party complainant, and prosecute the suit.

In support of that motion and application, complainants introduced and read to the Court the affidavit of said complainant, Elijah Denning. After giving a historical statement of the litigation and steps taken therein, affiant states that defendant, S. W. Dunlap, had, after the filing of the demurrer, wrongfully and without the knowledge of affiant or his counsel, procured himself to be appointed administrator of A. J. Denning, deceased; that "said Dunlap, as affiant is informed and believes, declines to permit his name to be used as a party complainant to this suit, as the administrator

of A. J. Denning, and by this means is endeavoring to defeat complainants in their right of action, and deprive them of their just rights;" that "the interest of said Dunlap, as executor of Mary Denning, deceased, is adverse to and in conflict with his interest as administrator of A. J. Denning," deceased; and that he, "as executor, is seeking to withhold from himself," as administrator, property which rightfully belongs to him in the latter capacity alone, and in which complainants are directly interested as distributees of A. J. Denning.

The Chancellor overruled this motion, refused to appoint an administrator *ad litem*, and caused his decree sustaining the demurrer and dismissing the bill to be entered.

Complainants made a proper bill of exceptions, and brought up the whole case by appeal.

Counsel for appellants assail the action of the Chancellor on two points. It is insisted, first, that the demurrer is not good in law; and, secondly, that an administrator *ad litem* should have been appointed, and the ground of demurrer thereby obviated.

*First.*—Without expressing an opinion upon the demurrer, we pass it with a mere citation of some of the authorities relating to the question therein made: *Thurman v. Shelton*, 10 Yer., 388; *Brown v. Bibb*, 2 Cold., 439; *Brandon v. Mason*, 1 Lea, 628, 629; *Christian v. Clark*, 10 Lea, 630; *Trafford v. Wilkinson*, 3 Tenn. Ch., 451.

*Second.*—The second insistence is well made. Complainants presented a clear and strong case for the appointment of an administrator *ad litem*. The statute on this subject is as follows:

“That in all proceedings in the Probate and Chancery Courts, and any other Courts having chancery jurisdiction where the estate of a deceased person must be represented, and there is no executor or administrator of such estate, *or the executor or administrator thereof is interested adversely thereto*, it shall be the duty of the Judge of the Court in which such proceeding is had to appoint an administrator *ad litem* of such estate for the particular proceeding. \* \* \* Such appointment shall be made whenever the facts rendering it necessary shall appear in the record of such case, *or shall be made known to the Court by the affidavit of any person interested therein.*” Acts 1889, Ch. 137, Sec. 1.

We have italicized the words of the statute especially applicable to the facts of this case.

Complainants brought themselves entirely within the letter and spirit of the law, both in the matter of practice and in the disclosure of merits. The facts upon which the appointment of an administrator *ad litem* was sought were “made known to the Court by the affidavit of” a “person interested” in the subject-matter of the litigation; and those facts disclosed, unmistakably, that Dunlap, the regular administrator of A. J. Denning, deceased, was “interested adversely” to the estate

of his intestate. Holding and claiming the assets as executor of Mary Denning, his interest in that capacity was necessarily adverse to the estate of A. J. Denning, of which he was administrator. He could not serve two masters at one and the same time.

The adverse interest contemplated by the statute is not merely a personal interest, but any interest which may prevent the executor or administrator from fully and fairly representing the estate of his testator or intestate.

Though the motion and application were not made until after the hearing on demurrer—being made at the same term—they should have been granted, to prevent justice from being defeated.

Reverse and remand for appointment of administrator *ad litem*, amended and supplemental bill, and further proceedings.



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Railroad v. Meacham.

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RAILROAD v. MEACHAM.

(*Jackson*. April 23, 1892.)

1. RAILROADS. *Measure of liability to trespassers on trains.*

Railroad company owes no duty to an intruder upon its train engaged otherwise than in transportation of passengers, except to refrain from willfully, wantonly, or intentionally injuring him. It is not liable for injury resulting incidentally to such intruder from the mistake, inadvertence, or negligence of its servants in operating such train.

2. SAME. *Same. Who is a trespasser.*

And a person is a trespasser, who, without invitation of an authorized agent, and without payment of fare, takes passage upon a timber-train, which is forbidden to carry other than those engaged in the shipment of lumber, he not being of that class.

Case cited and approved: *Railroad v. Wilson*, 88 Tenn., 316.

3. SAME. *Case in judgment.*

The plaintiff, without invitation or payment of fare, was traveling upon a timber-train, forbidden to carry passengers, upon defendant's road. In a collision, brought about by the negligence of defendant's servants in operating this timber-train, the plaintiff, in leaping from the train, was injured.

*Held*: The plaintiff was a trespasser, and not entitled to recover, except for willful, wanton, or intentional injury by defendant, and the Court should have so instructed the jury.

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FROM WEAKLEY.

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Appeal in error from Circuit Court of Weakley  
County. W. H. SWIGGART, J.

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Railroad v. Meacham.

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JOSEPH E. JONES for Railroad.

CHARLES M. EWING for Meacham.

LEA, J. This action was brought in the Circuit Court of Weakley County by James M. Meacham to recover damages alleged to have been sustained by him as the result of an injury inflicted on him by reason of a collision of two trains. It is alleged that the injury inflicted was caused by the carelessness and negligence of the employes, agents, and servants of the railroad company in charge of and operating said trains.

The train upon which defendant in error was riding, and in jumping from which he was injured, was a timber-train, upon which no persons were allowed to be carried except the employes of the train, the timber contractor, and his hands engaged in loading the cars. There is no pretense that defendant in error was either. He was not on the train by invitation of any one who had authority to invite him, nor did he pay any fare.

The Court, among other things, charged:

"If you find that the plaintiff was a trespasser on defendant's train engaged in taking of timbers, and going from McConnell to Martin, and while said train was making said trip on the defendant's line of road a collision occurred between said train going south and another train of defendant going north, and which was moved and operated by the servants of the defendant, and a wreck was

thereby caused, and that said collision was the direct or proximate result and consequence of the negligence, carelessness, or recklessness of the defendant's servants engaged in moving and operating said trains, or either one of them, and that the plaintiff was compelled to jump from said train to the ground just before said collision occurred, and that he received the injury as charged in the several counts in the declaration by reason of said jumping from said train under such circumstances, and that the plaintiff himself was acting in a prudent and cautious manner while so on said train so far as his safety was concerned, and that he was not guilty of any other fault or negligence tending to contribute to the injury, except the mere fact that he was on the train without any right to be thereon, then, under such circumstances, he would have the right to recover, notwithstanding the fact that he may have been a trespasser on defendant's train."

And he further adds: "Yet, if the plaintiff was on the train wrongfully, and was a trespasser, it would be the duty of defendant's servants, while so operating and moving said train, to use ordinary care and prudence to prevent an accident or injury to plaintiff, such as would be ordinary and reasonable under the circumstances."

This charge was erroneous. The defendant in error being an intruder upon the train, plaintiff in error owed him no such duty as to render it liable for the mistake, inadvertence, or negligence

of its employes. The only duty due by the railroad company to one who is an intruder upon its train not used for transporting passengers, is to refrain from wantonly, willfully, or intentionally injuring him. If the proof had developed that the collision in this case was designed and brought about with the intent and for the purpose of injuring the defendant in error, although an intruder, he would be entitled to recover, otherwise he would not.

In case of *Railway Co. v. Wilson, Adm'r*, 88 Tenn., it was determined by this Court that a baggage-master, who had left his baggage-car and got upon the engine, and in a collision—by the negligence of the engineer of the other colliding train—was killed, his administrator could not recover, because he was an intruder upon the engine.

The text-books and opinions of the Courts of quite a number of the States have been uniform that the company owed no duty to an intruder upon its freight-trains upon which passengers were not carried, except the duty not to wantonly or willfully injure him. Rorer on Railroads, Vol. II., 1113, Sec. 19; Am. and Eng. R. R. Cas., Vol. IV., 599.

The judgment is reversed and cause remanded. The defendant in error will pay cost.

## COLLINS v. INSURANCE CO.

(Jackson. April 28, 1892.)

1. CHANCERY PRACTICE. *Suit commenced, when.*

Suit in equity is commenced at date of filing bill and giving cost bond in such sense that the running of statutes of limitations is thereby arrested.

Code construed: § 5055 (M. & V.); § 4312 (T. & S.).

Cases cited and approved: *State v. Keller*, 11 Lea, 399; *Montgomery v. Buck*, 6 Hum., 416; *Carter v. Wolfe*, 1 Heis., 695.

2. SAME. *Same. Res adjudicata.*

And this question, having been adjudicated upon an appeal from a decree overruling demurrer properly raising it, is *res adjudicata* upon the hearing of the same case on appeal from final decree upon the merits.

3. SAME. *Abandonment of suit. Laches.*

The defense that a suit in equity has been abandoned by reason of laches in its prosecution, must be made by motion or plea, and is waived by answer to the merits.

4. SAME. *Same. Same.*

If the respondent avers certain matters *in pais* as constituting an abandonment of the suit by laches, the complainant may, without further pleading, rebut such defense.

5. SAME. *Same. Same.*

In this case delay of three years in issuance of process, after bill filed

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Collins v. Insurance Co.

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and cost bond given, is held not to operate as an abandonment of the suit.

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FROM GIBSON.

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Appeal from the Chancery Court of Gibson County. H. J. LIVINGSTON, Ch.

COOPER & HARWOOD for Collins.

PITTS, HAYS & MEEKS for Insurance Co.

W. A. HENDERSON, Sp. J. This bill was filed in the Chancery Court at Humboldt, on November 28, 1884, as appears by the indorsement thereon of that date by the Clerk and Master of that Court. Accompanying the bill, and indorsed thereon, was an indorsement by Mr. Hill, the solicitor, in accordance with a common practice, that he would be responsible for costs in that case.

The transcript shows no further step taken in the case until November 16, 1887, an interval of some three years, when the then Clerk and Master, acting upon the aforesaid acknowledgment of suretyship, filled out a formal prosecution bond, and issued subpœna to answer, which was on that day properly executed as to the said insurance company.

On April 10, 1888, the defendant filed its demurrer, by which it raised the question whether the case was barred by failure to bring suit within twelve months, as provided for in the policy of insurance, contending that suit had not been begun on November 28, 1884, when the bill had been filed, but only on November 16, 1887, when process had actually issued.

The Chancellor was of the opinion that said demurrer was not well taken, and the same was overruled, with leave to appeal. This question was fully and ably presented to this Court at a former term, when the action of the Chancellor was affirmed. In that action of the Court, Judge Snodgrass, of the present Bench, did not concur. In the decree of affirmance, it was recited that this Court did "not pass upon the effect of any laches or lapse of time between the filing of the bill and the suing out of process thereon, if any intervened," that question not being before the Court on demurrer.

On the case being remanded to the Chancery Court, the respondent entered no motion to dismiss, nor filed any plea as to laches nor lapse of time, but filed its answer as to the merits, and also attempted in said answer to again raise the question as to the bar of limitation.

By the action of this Court on the demurrer, as above recited, this question is *res adjudicata* against the respondent, and, by that means, is the law of this case.

On this question, whether a suit in equity is begun by the filing of a bill and securing costs, or whether it remains unbegun till process is sued out, to be regularly served, able and exhaustive arguments have been offered us in this case. Much contrariety of authority may be adduced, drawn largely from States having Code practice, and based, doubtless, upon their own statutes; but we are of the opinion, based upon the equity practice of this State, and upon the sounder authorities, that in Tennessee a case in equity is begun, has a status in Court, upon the filing of a bill and securing costs as provided by statute; always provided that it is done in good faith. 1 Daniel's Ch. Pl., 399; *State v. Kellar*, 11 Lea, 399; *Montgomery v. Bank*, 6 Hum., 416; 1 Heis., 695; Code (M. & V.), § 5055; Gibson's Suits in Ch., 166.

Again: The respondent, in its answer, alleges facts upon which it bases a defense of abandonment, and its solicitor plausibly contends that these allegations cannot be met by the complainant except by amended bill; that, upon this defense, there may be an issue in the pleadings, to which we reply—

*First.*—The defense of abandonment or laches in prosecution can only be made by motion to dismiss, or by appropriate plea. An answer to the merits waives and passes beyond such defense.

*Second.*—While it is true, as a general rule of equity pleading, that where a respondent discloses a defense such as a deed, acquittance, license, or



accord and satisfaction, and the complainant desires to attack that defense, he must do so by appropriate pleadings, so as to form an issue, yet, when the respondent alleges certain facts from which it is assumed such defense as relied on in this case flows, then, without further pleadings, the complainant may establish by evidence that such assumption does not follow, because the respondent has not given the facts, or all the facts, of that subject-matter.

We are of the opinion that this case falls within the latter category, and that the respondent has failed to make good his contention that there has been such laches or abandonment as should defeat this suit.

These questions out of the way, the respondent makes no contention as to its liability on the policy sued on.

The decree of the Chancellor having been in accord with the principles herein recited, is correct, and is in all things affirmed, with costs.

## MORTON v. STATE.

(Jackson. April 28, 1892.)

1. CRIMINAL LAW. *Punishment for felonious assault.*

M. was convicted of an assault with intent to commit voluntary manslaughter, and sentenced to one year's imprisonment in the penitentiary. No fine was imposed. The statute provides that persons convicted of this class of offenses shall "be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not more than one year and by fine not exceeding five hundred dollars, at the discretion of the jury."

*Held:* The judgment is valid. If imprisonment in the penitentiary is inflicted, no fine should be imposed; but in case of imprisonment in county jail, fine should be imposed in addition.

Code construed: § 5379 (M. & V.); § 4630 (T. & S.).

Cases cited and approved: McDougal v. State, 5 Bax., 661; Hayes v. State, 15 Lea, 65; Delacy v. State, 8 Bax., 401; Clark v. State, 86 Tenn., 512; Rafferty v. State, *post*, p. —.

Cited and distinguished: Ragsdale v. State, 10 Lea, 671.

2. CRIMINAL PRACTICE. *Omission in Court's charge erroneous, but not reversible, when.*

Upon trial of a defendant under an indictment for felonious assault, the Court charged the jury correctly that they might convict him of simple assault, and that if they did so, and thought the offense merited a fine of more than fifty dollars, they should assess it. The Court omitted to instruct the jury as to their duty if they should find the defendant guilty of simple assault and think his offense merited a fine of less than fifty dollars.

*Held:* This omission constitutes error, but not reversible error, in a case where the defendant is convicted of the felonious assault and sentenced to the penitentiary.

Code construed: §§ 6062, 6078 (M. & V.); §§ 5223, 5237 (T. & S.).

Case cited and approved: Tarvers v. State, 90 Tenn., 499.

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Morton v. State.

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3. EVIDENCE. *Res gesta. Declarations of third persons.*

Upon a trial for felonious assault, where the defendant insists that he fought in defense of himself and his wife's mother and sister against the assaults of the prosecutor and his wife, it is error to reject evidence offered on behalf of defendant that some one in the crowd exclaimed during the encounter: "Kill him! Don't let that nigger get back to the bottom. Kill him!" although the witness is unable to name the person who made the exclamation. This evidence is admissible as part of the *res gesta*, and as tending to explain defendant's danger and situation.

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FROM GIBSON.

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Appeal in error from Circuit Court of Gibson County. JOHN R. BOND, J.

COOPER & HARWOOD for Morton.

Attorney-general PICKLE and L. H. TYREE for State.

CALDWELL, J. John Morton, plaintiff in error, was indicted for an assault with intent to commit murder in the second degree. The trial jury found him guilty of an assault with intent to commit voluntary manslaughter, and assessed his punishment "at one year in the penitentiary." After overruling motions for new trial and in arrest, the Circuit Judge pronounced judgment in accordance with the verdict. Morton appealed in error.

It is earnestly contended, in behalf of the pris-

oner, that the verdict and judgment are without authority of law, and absolute nullities, because they limit the punishment to *imprisonment* alone, and do not also impose a *fine* as a part of the punishment.

The statute under which the indictment was found and the conviction had is as follows: "If any person assault another with intent to commit, or otherwise attempt to commit, any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not more than one year and by fine not exceeding five hundred dollars, at the discretion of the jury." Code (T. & S.), § 4630.

The insistence that this language requires the infliction of both fine and imprisonment in every case of conviction is accorded the merit of plausibility; yet, such is not the more reasonable construction. To our minds, the true and obvious meaning of the statute is that the convict shall be punished either by imprisonment *in the penitentiary*, without more, or by imprisonment *in the county jail and fine*; and, whether the one mode or the other shall be adopted is left to the discretion of the jury. If they think the crime merits confinement in the penitentiary, they must impose a sufficient term of imprisonment, not exceeding five years, to embrace the whole scope

of punishment and cover the whole case; or, if they deem other punishment more in consonance with the demands of justice in the particular case, they may fix a term of imprisonment in the county jail not more than one year, and add to that a fine not exceeding five hundred dollars.

By a fair transposition of the last clause of the statute, all possible ambiguity is removed. This is illustrated in McDougal's case, where this Court, speaking through Judge Deaderick, said that an offense under this statute "is punishable by confinement in the penitentiary not exceeding five years, or, in the discretion of the jury, [by] imprisonment in the county jail for not more than one year, and by fine not exceeding five hundred dollars." *McDougal v. State*, 5 Bax., 661.

Numerous judgments upon just such verdicts as the one before us have been affirmed by this Court. See *Hayes v. State*, 15 Lea, 65; *DeLacey v. State*, 8 Bax., 401; *Clark v. State*, 2 Pickle, 512; *Rafferty v. State*, *post*, p. — (S. C., 16 S. W. R., 728).

In each of those cases a conviction was had and enforced under the statute here construed, though in each of them there was a penitentiary sentence *without fine*. It is proper to observe further, in reference to those cases, that the question here debated was not mentioned by the Court in any of them. They are not referred to as express decisions of that question, but as strongly persuasive of the correctness of our interpretation of the law.

Ragsdale's case is cited as authority for a contrary construction. The decision there made is fairly stated in the head-note, as follows:

"Where the verdict in a criminal case is not warranted by law, no valid judgment can be rendered on it—as, where the jury assess the punishment at a fine when the law prescribes both fine and imprisonment for the particular offense—and the judgment will be reversed upon appeal by the State, and the cause remanded for new trial." *The State v. Ragsdale*, 10 Lea, 671.

In that case the jury found Ragsdale guilty of an assault with intent to commit murder in the second degree, and assessed his punishment at a fine of \$500, without more. The trial Judge reduced the fine to \$75, and rendered judgment for the latter sum. In the conclusion of the opinion, the Court said: "The punishment prescribed by the statute is both imprisonment and fine." *Ib.*, 673.

Though that language is general, and may well be said to embrace both jail and penitentiary punishments, it does not expressly state or decide the question raised here. Whether a penitentiary sentence, without fine, could be sustained under the statute was not in terms decided; nor does it affirmatively appear from the opinion that such a question was considered by the Court.

That the Court has not since understood that question to have been so decided in that case, seems to follow from the fact that in three later

cases (15 Lea, 65; 2 Pickle, 512; 16 S. W. R., 728), a contrary construction has been practically applied in the affirmance of penitentiary sentences with which fines were not assessed as a part of the punishment.

If that was a case for the infliction of a \$500 fine, as the jury found it to be, then, as a part of the punishment, the statute required that imprisonment be imposed also—that imprisonment, however, to be in the county jail. In that view the decision was right; and to that view it is now limited.

The trial Judge properly instructed the jury that the defendant might be convicted of a mere assault, if they should believe from the evidence that he was guilty of that offense (Code, T. & S., § 5223); and, with respect to the punishment therefor, he said: "If you find him guilty of an assault simply, and should be of opinion that his offense merits a fine of more than fifty dollars, you will fix the fine and report it with your verdict." What return they should make, or what punishment would follow, in case they found him guilty of a simple assault and thought his offense did not merit a fine of more than fifty dollars, the jury were not informed.

In the conclusion of the charge, His Honor said: "If you find the defendant guilty of any one of the offenses herein defined [naming assault with intent to commit murder in the second degree, assault with intent to commit voluntary

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Morton v. State.

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manslaughter, and simple assault], you will fix his punishment within the limits hereinbefore directed."

Not having previously given the jury direction as to any punishment for a simple assault, except by fine in excess of fifty dollars, the latter instruction was tantamount to telling them that such offense was punishable alone by fine of more than fifty dollars, and that if they should find him guilty of such offense, they must assess his fine accordingly.

This was erroneous and misleading; the law being that a jury, finding a defendant guilty of a simple assault, and believing that he does not merit a fine of more than fifty dollars, may merely return a verdict of guilty, and leave the Court to assess the punishment. Const., Art. VI., Sec. 14; Code (T. & S.), § 5237.

But having been convicted of a higher grade of offense, the prisoner can take no advantage of that error. It is entirely immaterial, and affords no ground of reversal, since the jury found him guilty of an assault with intent to commit voluntary manslaughter, and the erroneous instruction related alone to the punishment of a mere assault. *Tarvers v. State*, 6 Pickle, 499.

The defendant was several miles from home, at church, when the difficulty in which he is said to have cut the prosecutor occurred. His theory of the matter, before the jury, was that he fought in self-defense, and in protection of his wife's mother and sister, whom he insists had been and were



being assaulted and abused by the prosecutor and his wife. In support of this theory, he sought to prove various facts, among them, that during the rencounter some one in the crowd was heard to say of the defendant: "Kill him! kill him! don't let that nigger get back to the bottom. Kill him!" He offered to prove by Polly Mack, who was present and witnessed the difficulty, that she heard some one in the crowd make this exclamation.

The Court rejected the evidence as incompetent because the witness was not able to state who used the language.

This ruling was erroneous. The rejected evidence was clearly competent as a part of the *res gestæ*, and as tending to show great hostility toward the defendant and the danger to which he was exposed.

Two other witnesses were afterwards allowed to state that they heard Smiley Jennings use the language in question; but that did not cure the error, for the defendant was entitled to the broadest proof he could make on that subject. Besides, the evidence of those two witnesses seems to have been admitted alone for the purpose of contradicting Smiley Jennings, one of the State's witnesses, who had previously denied the use of such language by himself.

Reversed and remanded.

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State v. Railroad.

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## STATE v. RAILROAD.

(Jackson. April 28, 1892.)

1. RAILROADS. *Indictable for obstructing highway.*

Doctrine re-affirmed that railroad corporations are liable to indictment for obstructing the public roads.

Case cited and approved: Railroad v. State, 3 Head, 523.

2. SAME. *Same. Defense.*

A railroad corporation, indicted for obstructing a public road by permitting its train to stand across the road for an unreasonable length of time, cannot defend itself by showing that its servants engaged in the operation of trains were forbidden by its general rules and regulations to permit trains to remain across public roads for an unreasonable time. For such acts of its servants, done within the scope of their duty, the corporation, though forbidding the acts, is criminally responsible.

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FROM GIBSON.

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Appeal in error from Circuit Court of Gibson County. J. R. BOND, J.

Attorney-general PICKLE and M. B. GILMORE for State.

W. J. MCFARLAND and MCCORRY & BOND for Railroad.

LURTON, J. A train of cars was permitted to stand across a public county road for an unreasonable length of time, thereby impeding the use of the road by the traveling public. The corporation was indicted and found guilty of a public nuisance, and fined in the sum of fifty dollars. Upon the trial it was admitted by the State that, under the rules and regulations of the company, its employes in charge of its trains were prohibited from permitting trains to stand across a public road in such manner as to obstruct travel for more than five minutes. In the instance relied upon by the State, the train had been permitted to stand across a public road for from twenty to thirty minutes.

The Circuit Judge instructed the jury that the fact that this obstruction was for a longer time than permitted by its rules and instructions, was no defense against the indictment. This is assigned as error.

That railway corporations are liable to indictment for obstructing a public highway has been long settled. *L. & N. R. R. Co. v. The State*, 3 Head, 523.

[Being a corporation, it necessarily acts only through its agents.\* If the obstruction is the act of its agent, it is the act of the corporation; provided the agent did the act in the course and scope of his duty as an agent. It is immaterial that the agent was, by the rules of the company, instructed not to permit such obstruction to continue for a time deemed by the corporation to be unreasonable.

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If such agent disobeys the reasonable requirement of the corporation, it becomes liable for the nuisance, because the agent was within the scope of his duty in operating the train and in stopping it across a public road. This principle is necessary to be enforced in regard to acts of misfeasance by corporations of this character. Otherwise, the public would be required to look alone to subordinates, in general unknown and irresponsible.] 2 Woods Railway Law, pp. 1383, 1384, and authorities cited.

Affirm the judgment.

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Jackson v. Pool.

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## JACKSON v. POOL.

(Jackson. April 28, 1892.)

1. JURY. *Resident and tax-payer of city competent in suit against city.*

Residents and tax-payers of a municipal corporation are not disqualified, by reason of their relations to the corporation, to sit upon a jury in a case to which the corporation is an interested party.

Cases cited and approved: Mayor, etc., v. McKee, 2 Yer., 168; Ezell v. Giles County, 3 Head, 586.

2. SAME. *Abuse of Judge's power to order special jury.*

It is an abuse of the Judge's power to order a special jury, for which reversal will be had, where he directs the jury to be selected by the Sheriff and summoned from the county outside the limits of a particular city, the persons residing in and outside such city being equally competent.

Code construed: § 4805 (M. & V.); § 4029 (T. & S.).

Cases cited: Clingan v. Railroad, 2 Lea, 726; Mayor, etc., v. Sheperd, 3 Bax., 373.

3. EVIDENCE. *Of city's wealth incompetent in suit against it for personal injuries.*

In suit against a municipal corporation for personal injuries sustained by reason of defect in sidewalk, it being clearly a case in which punitive damages could not be awarded, evidence is not admissible on behalf of the plaintiff to show the value of the property owned by the corporation, or the assessed value of property situate in the city, or the amount of salary paid to the Mayor of the city.

4. SAME. *Same. No reversal without specific exception.*

But reversal will not be had for the erroneous admission of such incompetent evidence, unless the record shows that specific exception was taken to its competency.

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Jackson v. Pool.

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5. SAME. *Introduction of things as proof.*

It is competent for the parties to exhibit to Court and jury, as matter of proof ancillary to other testimony, persons, models, and things not cumbrous, whenever the inspection of them may tend to the discovery of the truth of the matter in controversy. Whether the articles offered are too cumbrous, is a question addressed to the trial Judge's discretion. This Court declines to revise the action of the trial Judge in this case in excluding the portion of the sidewalk, consisting of two planks and cross-bars, on account of defects in which the plaintiff was injured.

6. ARGUMENT OF COUNSEL. *When not cause for reversal.*

Unless this Court can see that improper argument of counsel probably influenced the action of the jury, there will be no reversal on that account, even when proper exception was taken thereto.

7. SAME. *Same. Example.*

In suit against city for personal injuries, the plaintiff's attorney, in his closing argument, said: "If one of you should come to town and violate one of the ordinances of the city government by any disorderly conduct, you would see how quick you would be arrested and carried before Mayor Gates and fined." This was objected to. It was said in reply to this language of defendant's attorney: "If you give a verdict against the defendant in such trivial cases as this one, you will place a burden upon our young city that it will not be able to bear \* \* \* It would bankrupt and ruin the city to require it to keep all its streets and sidewalks in perfect repair."

*Held:* Argument of plaintiff's attorney does not constitute reversible error.

8. SAME. *Judge's action upon exception erroneous.*

But the Court's ruling upon the exception, "that the matter of fines was one source of revenue for the city," is error.

9. SAME. *Reading opinions of Courts in cases giving large damages.*

It constitutes reversible error for the Court to permit the plaintiff's attorney in a personal injury case to read, over objection of defendant's attorney, opinions from the reports in cases where large damages were awarded, for the sole purpose of influencing the jury in fixing amount of damages. In this case the Court declines to express an opinion as to whether the reading of such cases from the reports, over

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objection, is error, the counsel having stated the cases were read for another purpose, and the Court having properly instructed the jury that they should not be influenced by them in fixing amount of damages.

10. CHARGE OF COURT. *Erroneous as to city's liability for latent defects in sidewalks.*

In suit against a city for personal injuries sustained by the plaintiff while passing over a common plank sidewalk laid upon the ground, by reason of an alleged defect therein, there being proof tending to show the defect was latent, it is error for the Court to charge that the city was liable, though the defect was latent, if it could have been discovered by "inspection, observation, or otherwise." This strong doctrine is not applied to latent defects in common sidewalks, but only to defects in structures over dangerous places.

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FROM MADISON.

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Appeal in error from Circuit Court of Madison County. LEVI S. WOODS, J.

CARUTHERS & MALLORY for Jackson.

J. M. TROUTT and HAYNES & HAYS for Pool.

LEA, J. This is an action for damages against the city, brought by defendants in error for injuries to Mrs. Pool by having her arm broken, being thrown down by a defective plank-walk. There was a verdict for plaintiffs below, and defendants appealed.

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Jackson v. Pool.

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A number of errors are assigned: First, that upon motion of plaintiffs, without cause shown, the Sheriff was ordered by the Court to summons as jurors citizens from the country, and not to summons tax-payers or residents of the city of Jackson; and that A. P. Moore, one of the jurors so summoned, was ordered by the Court to stand aside because he was a citizen of Jackson, though not a tax-payer. These orders of the Court were over the objection of the defendants.

The question is presented whether a tax-payer or resident of a municipal corporation is a competent juror in a suit by or against the corporation, having no individual interest in the subject of the suit. The object of the law is to secure a fair and impartial trial, and, to this end, to secure fair and unbiased jurors. It is said in argument that there has been no direct adjudication of this exact question in this State. While this may be true, the same has been indirectly decided, and has never been questioned, so far as we are aware, since the decision of this Court in *Mayor and Aldermen of Jonesborough v. Adam McKee*, 2 Yer., 168, where it was held that Magistrates who were residents of a municipal corporation are not incompetent to issue warrants and try causes in which the corporation is interested if they have no individual interest in the subject of the suit. If not incompetent to try suits for or against the corporation, then certainly they would not be incompetent jurors to try the same. When the case



in 2 Yer., 168, was decided, our statutes made every one having any interest in a suit incompetent to testify therein; yet, in that case, it was decided that in all questions respecting the rights and immunities of a municipal corporation, individuals, though members of the corporation, were not incompetent witnesses.

In *Ezell v. Justices of Giles County*, 3 Head, 286, it was held that, in a suit against the county, a Justice was a competent witness in the suit, his interest being too remote and contingent, as well as too minute, to disqualify him.

The suit is against the corporation, and not against citizens of the corporation, and, in the absence of some individual interest, we hold that the fact that a person is a resident or tax-payer of a municipal corporation does not render him incompetent as a juror in a suit by or against the corporation. If they are incompetent as jurors, so would a recorder of a town or city be incompetent to try a corporation case, and so would a Judge be incompetent to hear and determine a case in which the city of his residence was a party. But it is insisted that by the Code, §4805, it is provided that a special jury may be ordered, upon motion of either party in any civil action, if, in the opinion of the Court, it is proper; and that it has been held that the Judge may designate the persons to be summoned, and his discretion in ordering a special jury will not be revised. *Clingan v. R. R.*, 2 Lea, 726, 727.

If the Judge had ordered a special jury, as authorized by statute, or had designated who should be summoned, then his discretion would not probably be revised, nothing else appearing. But he did not order the Sheriff to summons a special jury of certain qualifications, nor did he designate the jurors who should be summoned; but he ordered the Sheriff to summons citizens from the country, and not to summons citizens of Jackson. The law, in its provision for a special jury, contemplates the selection of men with reference to their superior competency and fitness to try and determine the particular issues involved in the case, but he cannot direct the Sheriff, where all are equally competent, not to summons those whose residence is within the city limits, but to summons only those who reside beyond the city limits, no more than he can authorize him to summons those citizens only of German descent and not to summons those of Irish descent, or to authorize him to summons negroes and not to summons white men. 3 Bax., 373. He might, if he so desired, have designated the names of those to be summoned, but this he did not do. This assignment of error is sustained.

The second assignment of error relied on is the admission of proof as to the value of the property of the city, the value of the city hall, water-works, and the assessed value of all the property of the city; also the amount of salary paid the Mayor.

This would have been clearly erroneous, it not being a case where punitive damages could have been allowed, if objection had been made. The only objection interposed was a general objection to the question as to the amount of the Mayor's salary. Therefore, this assignment of error is overruled.

The next error assigned is that, upon objection, the Court refused to permit the defendant to bring into Court, and exhibit to the Court and jury as evidence, that portion of the sidewalk, consisting of two planks and cross-bars, on which the plaintiff was hurt, to prove that they were not in the condition as some of the witnesses had sworn. As a matter of proof, ancillary to other testimony, parties are permitted to exhibit to the Court and jury persons, models, and things not cumbrous, whenever the inspection of them may tend to the discovery of the truth of the matter in controversy. 3 Greenleaf on Evidence, Sec. 328. Whether the articles proposed to be exhibited are too cumbrous or not is committed to the discretion of the Court, which will not be revised in this instance.

It is next assigned as error that the Court, over the objection of defendant, permitted the plaintiff's attorney, in his closing argument, to use improper argument, in this: "If one of you should come to town and violate one of the ordinances of the city government by any disorderly conduct, you would see how quick you would be arrested and carried before Mayor Gates and fined." This was used in

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reply to the argument of defendant's attorney, that "If you give a verdict against the defendant in such trivial cases as this one you will place a burden upon our struggling young city that it will not be able to bear. \* \* \* It would bankrupt and ruin the city of Jackson to require it to keep all its streets and sidewalks in perfect repair."

We will not say that the argument of plaintiff's attorney, under the circumstances, was improper. It is not every improper argument of counsel that will cause a reversal of the case, but only where we can see that such improper argument did probably influence the jury. When the court was asked to stop the counsel in the supposed improper argument, the Court refused to do so, saying "that the matter of fines was one source of revenue for the city." This remark of the Court was erroneous, for, as we have already stated, the matter of revenue was not involved—the jury had nothing to do with the revenue of the city in making up their verdict.

The next assignment of error is that the Court allowed the attorney for the plaintiff, over the objection of the defendant, to read decisions to the jury where large verdicts were given against towns and cities. The attorney of plaintiff, upon objection being made, stated to the jury that these opinions were not read for the purpose of influencing them in fixing the amount of damages, but to show the kind of obstructions for which a city would be held liable. It certainly was hardly nec-

essary to read to the Court opinions to prove that the city might be rendered liable for defective sidewalks. Where decisions are read from the reports to influence the jury in fixing the amount of damages, or where the tendency of the same may be to influence the jury in fixing the damages, the Court should interpose to prevent it, and a failure to do so, upon objection, is reversible error. But, in this case, as the attorney stated, they were not read for that purpose, and as it appears that at least one of the opinions did not state the amount of the damages, and as the Court told the jury they could not regard the decisions read in fixing the amount of their verdict, we express no opinion as to whether this, under the conditions above named, be reversible error, as the case must be reversed on another ground.

The next and last assignment we shall notice is, that there was error in the charge of the Court as follows: "If there was a defect in the street or sidewalk, and it was not reasonably safe for persons passing along it in the usual modes, while exercising reasonable care and caution, and such defect was a latent defect and not a patent defect; but, if the defect, though a latent one, was of such a character that the officers whose duty it was to keep the streets and sidewalks in repair, could, with reasonable and proper care, by inspection, examination, or otherwise, have ascertained such defects by the exercise of reasonable and proper care, the defendants would be charged with

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Jackson v. Pool.

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notice of such defect," etc. The Court, before the extract quoted, had given a full and fair charge as to the liability of municipal corporations after actual or constructive notice of the defect and time to repair. The complaint is, that the Court should then add that the corporation was liable for a latent defect which might have been discovered by "inspection, observation, or otherwise;" and that this became material by reason of the testimony of at least one witness, who swore that the defect in the sidewalk was of a latent character. A corporation may be liable for latent defects over dangerous structures or dangerous places, and the same should be inspected from time to time; but this cannot apply to a plank sidewalk on the ground. The corporation is not required to take up and examine from time to time all the plank walks in the city lying on the ground, when the same is apparently in good condition, and therefore it was confusing to the jury and erroneous to charge as to latent defects unless it had been confined to structures over dangerous places or to dangerous places over which the sidewalk was constructed.

The case will be reversed and remanded, and the defendant in error will pay costs.

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Loague v. Railroad.

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LOAGUE v. RAILROAD.

(*Jackson.* May 3, 1892.)

REVIVOR. *Of widow's suit for negligent killing of husband.*

Widow's suit for negligent killing of her husband cannot be revived and prosecuted in name of her personal representative where she dies during its pendency.

Code construed: §§ 3130, 3131, 3132, 3134 (M. & V.); §§ 2291, 2292, 2293 (T. & S.).

Cases cited: Hall v. Railroad, Thomp. Cas., 204; Flatley v. Railroad, 9 Heis., 230; Bledsoe v. Stokes, 1 Bax., 312; Trafford v. Express Co., 8 Lea, 109; Greenlee v. Railroad, 5 Lea, 418; Railroad v. Lilly, 90 Tenn., 565.

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FROM SHELBY.

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Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

T. W. & R. G. BROWN for Loague.

JAMES M. GREER and FRANK P. POSTON for Railroad.

LURTON, J. Mattie Curry, as widow of John W. Curry, brought an action against the defendant railway company for the negligent killing of her

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Loague v. Railroad.

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husband. Pending this suit, she died, and John Loague, as her administrator, moved the Court to permit him to revive the suit in his name. This motion was resisted by the defendant, and overruled by the Court.

At the common law, the right of action for personal injuries died with the person injured.

By our Act of 1851-52, carried into the Code as §§ 3130, 3131 (M. & V.), the rule of the common law was so far modified as to save the right of action of a person dying by the wrongful act of another, by providing that such right should not abate or be extinguished by death, and that the suit might be instituted by the personal representative of the deceased for the benefit of the widow or next of kin, and by further providing that if he decline to bring such suit, the widow and children of the deceased might, without his consent, use his name in bringing such suit.

Under that Act it was decided that, although the suit was for the personal benefit of the widow and next of kin, yet they could not sue in their own names, and that the suit would lie only in the name of the personal representative. *Hall v. N. & C. R. R. Co.*, Thompson's Cases, 204; *Flatley v. M. & C. R. R.*, 9 Heis., 230; *Bledsoe v. Stokes*, 1 Bax., 312. These cases rested upon the terms of the Act, saving a right otherwise extinguished. "It is a general principle," said Judge McFarland, in *Flatley v. Railroad*, "that where a right is given by statute, and a remedy provided in the



same Act, the right can be pursued in no other mode."

The law thus stood from 1851 until the Act of 1871, Ch. 78, found as § 3132 of the Code (M. & V.), by which this right of action might be prosecuted by the widow in her own name, and, if there was no widow, then by the children. The right of action under both Acts was the right of the deceased. The ground of action was the wrong to the deceased. The Acts only preserved the right and regulated the mode in which the suit might be prosecuted.

After some fluctuation, it was finally settled that, under these Acts, the only damages which could be recovered in any action under them were the damages which the deceased was entitled to recover if he had sued. *Trafford v. Express Co.*, 8 Lea, 109. Subsequently, the Act of 1883, Ch. 186, was passed, compiled as § 3134 of the Code (M. & V.). By this Act it was provided that where the death was caused by the fault of another, "that the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received." This Act in no way changes the mode of suing. The suit must still be prosecuted by the widow, or the children, if there is no widow,

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or by the personal representative of the deceased. It does not confer upon the widow any independent right to sue exclusively for the damages resulting to herself or the children. One action is given. In it all the damages, resulting either to the deceased or to those for whose benefit the action may be prosecuted, are to be recovered. The only effect of the Act is to enlarge the right of the person suing, so as to permit the recovery of the damages peculiar to the widow and children, together with the damages which the deceased might have recovered for his own benefit, and on account of his own suffering and loss.

It would seem to follow, therefore, that these statutory damages can only be recovered in the mode prescribed by the statute. The widow may prosecute the suit; but if there be no widow, or she die pending the suit, in whose name may the suit be then prosecuted? The statute answers the first inquiry. "The widow alone has the right to sue in the first instance. The children have the right only where there is no widow." *Greenlee v. Railroad*, 5 Lea, 418. The statute does not provide that the suit of the widow may be prosecuted by her personal representative. The right to conduct such a suit by the widow depends on the statute. She prosecutes as *quasi* trustee. The recovery is to be distributed as the personal estate of the deceased, free from the claims of creditors. Her representative takes only her estate, and is responsible on his bond only to her creditors and

distributees. He may revive only suits brought in her right, and does not succeed to her actions as trustee. It is true she has a beneficial interest, but her right is a devisative and dependent one. It is a recovery which is to be distributed as the personal estate of the deceased. The right of action is still the right of the deceased, although the recovery may include as an element such damages as were sustained by the persons to whom the statute gives the recovery. The right of action being given only by the statute, must be prosecuted according to its provisions.

Judge Caldwell, in *Railway v. Lilly*, 90 Tenn., 565, in speaking of this statute, said: "No right of action will be inferred; no remedy will be given in favor of any persons, except those distinctly contemplated as beneficiaries."

We think the administrator of Mrs. Curry had no right to revive this suit, or prosecute it in his name.

Affirm the judgment.

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Judge SNODGRASS is of opinion that where the widow has brought suit, and dies while such suit is pending, that she had such beneficial interest in the action as to entitle her personal representative to revive and prosecute it.

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Irvine v. Palmer.

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## IRVINE v. PALMER.

(Jackson. May 5, 1892.)

RETAINER. *Of legatee's debt to the estate out of his legacy.*

An executor has the right, and it is his duty, to retain out of a legacy any amount due from the legatee to the testator's estate. The legatee's indebtedness to the estate constitutes an equitable lien upon the legacy, that cannot be defeated or supplanted by his creditors.

Cases cited and distinguished: *Towles v. Towles*, 1 Head, 601; *Mann v. Mann*, 12 Heis., 246; *Steele v. Frierson*, 85 Tenn., 436.

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FROM GIBSON.

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Appeal from Chancery Court of Gibson County.  
H. J. LIVINGSTON, Ch.

COOPER & HARWOOD for Irvine.

NEIL & DEASON, and R. P. RAINES for Palmer.

LEA, J. Complainant filed his bill in this case on January 3, 1887, against W. R. Palmer, Mrs. Jane James, and T. J. Warren, administrator of J. W. Hays. He charges that he had recovered, in 1883, a judgment for \$1,631.73 and costs against

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Defendant Palmer, and that said judgment was still unsatisfied, and execution had been returned *nulla bona*; that in December, 1886, J. W. Hays died testate; that his will had been duly proven, and that on January 1, 1887, Defendant T. J. Warren qualified as administrator of said Hays, with the will annexed; that by the terms of said will Defendant Palmer is made a legatee, and will perhaps receive enough money to pay the debt due complainant; that testator directs a sale of his real estate, and that the same be converted into money and divided between certain of his relations, one of whom is Defendant Palmer. He prays for injunction, etc., and that such decrees be rendered as will subject Palmer's interest in J. W. Hays' estate to the payment of his debt and costs.

Palmer answered, and, by written agreement, admitted his indebtedness to complainant, and agreeing that his interest in the estate was liable for its payment.

Warren, administrator, answered, admitting that Palmer was a residuary legatee under the will of J. W. Hays, but set up in his answer, as a defense to complainant's right of recovery, that at the time of the death of J. W. Hays, Defendant Palmer was indebted to him by account, and that subsequently, upon a settlement with Defendant Warren, he had executed his note to him, as administrator, for \$454.72, and insists that said debt is a prior charge upon the legacy of said Palmer to the claim of complainant, and, if there is a

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residue of the estate, that he has a right "to retain the same or enough of the same to liquidate and pay off said debt due the estate of J. W. Hays, and his right to do this is in no way affected by the attachment of complainant." There is no issue or controversy as to facts; the only issue is as to priority of payment. Complainant insists that he is entitled to such priority under the facts stated, having fixed a lien thereon; and Defendant Warren insists he is first entitled to retain enough of said legacy to pay what the legatee owes the estate.

Upon this issue the Chancellor decreed that Defendant Warren, administrator, has the right and should retain out of said legacy of Palmer, a sufficient amount to pay his note and interest before complainant can receive any thing on his debt out of said legacy; that Defendant Warren, administrator, has priority over complainant. From this decree complainant has appealed. The decree of the Chancellor is correct. The right of retainer for a debt due the estate from a legatee is an equitable doctrine which has received the support and sanction of Courts of Equity from the earliest cases. The right to retain is grounded upon the principle that it would be inequitable that a legatee should be entitled to his legacy while he retains in his possession a part of the funds out of which his and other legacies are to be paid. He should not receive any thing out of such a fund without deducting therefrom the

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amount of that fund which he has in his hands as a debt to the estate. An assignee of the legatee takes his legacy subject to the same equity which exists against it in his hands. This equitable principle and doctrine is approved by all the leading text-writers. In 2 Redfield on Wills, p. 581, it is stated: "There seems to be no question of the right and duty of the executor to set off any debt due the estate from a legatee against any legacy which he may be called on to pay. But this right of retainer does not extend to an indebtedness created after the decease of the testator, by the legatee giving security to the estate for the indebtedness of other parties. It has been held that the executor's right to retain upon debts due the estate, as against legatees, is prior to any right of a mortgagee of the legacy."

In 1 Pomeroy's Eq. Jur., Sec. 541, it is stated: "In fact, such a legacy produces no effect upon the indebtedness. The only effect such a legacy, given *simpliciter*, can have, is to create the right to an equitable set-off. The legatee might not be forced, by means of a legal action, to pay the debt to the executors when he could, in turn, recover back from them the same amount or a part thereof, by virtue of his legacy. A Court of Equity, in order to prevent this circuity of action, may permit the executors to set off the debt against the demand made on them for the legacy; and if the estate is solvent, so that the debtor will be entitled to receive payment of his legacy, the

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Court may compel the executors to give him credit for the amount of his legacy, when they are seeking to enforce the claims of the estate upon him for the debt."

It is said in Williams on Executors: "Where a legatee is indebted to the testator, the executor may retain the legacy, either in part or full satisfaction of the debt, by way of set-off." 2 Williams on Ex., 1119. So, also, Adams' Equity, side-page 223.

But it is insisted for complainant that a contrary rule prevails in this state, and we are referred to the cases of *Towles v. Towles*, 1 Head, 601; *Mann v. Mann*, 12 Heis., 246; and *Steele v. Frier-son*, 1 Pickle, 436, as sustaining complainant's contention. The case of *Towles v. Towles*, 1 Head, was the sale by an heir of his interest in land, and the administrator afterward sought to collect out of the land a debt due from the heir to the estate. The Court said if the sale was *bona fide* it would hold against the debt of the estate. In *Mann v. Mann*, 12 Heis., it appeared that a son was indebted to his father's estate, and was insolvent. His interest in his father's estate was attached, upon his father's death, by some of the creditors for their debts. The administrator sought to have the indebtedness from the son to the estate of the father given priority over the attaching creditors. The Court held: "The son's indebtedness to his father's estate is not a lien on the son's share in the father's realty, which share is



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Irvine v. Palmer.

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therefore subject to a race of diligence between the personal representative of the father and the other creditors of the son." *Steele v. Frierson*, 1 Pickle, was where there was an assignment by a son, before his father's death, of his interest in his father's estate, his interest being real and personal. But whether there was involved in the controversy before the Court any personalty, does not very clearly appear. The cases referred to in the opinion as sustaining the position assumed, were cases involving realty alone. But be this as it may, the parties were content not to raise or present the question of retainer; nor was the same argued before or passed upon by the Court. The cases do not sustain the contention of the complainant. Neither of the cases was a contest between the legatee and an executor, but were cases of realty which, upon the father's death, descended directly to the heir, and a lien had to be fixed either by attachment or assignment. In this case, it is a legacy in the hands of the administrator *cum testamento annexo*.

The decree will be affirmed with costs.

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Mills v. Terry Manufacturing Co.

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## MILLS v. TERRY MANUFACTURING CO.

(Jackson. May 5, 1892.)

1. MECHANICS' LIEN. *Furnisher has none, when.*

The seller of materials to a contractor is not entitled to a furnisher's lien upon the property repaired or constructed therewith, where there is no special contract between the seller and the owner of the property or the contractor that such materials should be used in construction or repair of the particular property against which the furnisher's lien is asserted.

Code construed: §§ 2739, 2740 (M. & V.); §§ 1981, 1981a (T. & S.).

Acts construed: Acts 1889, Ch. 103.

2. SAME. *Case in judgment.*

M. & Co., merchants dealing in building supplies, sold to T., a contractor, a lot of window-blinds. Most of these blinds were used by T. in the construction of a house for F. M. & Co. had no contract with T., the contractor, or F., the owner, that said window-blinds were to be furnished for F.'s house, or for any particular building.

*Held:* M. & Co. have no furnisher's lien upon F.'s house for the blinds used by T. in its construction.

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FROM SHELBY.

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Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

EDGINGTON & EDGINGTON for Mills.

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Mills v. Terry Manufacturing Co.

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S. J. SHEPHERD for Defendants.

W. A. HENDERSON, Sp. J. This case involves the construction of the mechanics' lien law, to the end that it may be determined whether the plaintiffs have a lien upon the house and lot of the defendant, John T. Frost, situate in the city of Memphis. The plaintiffs were adjudged to be not so entitled in the Circuit Court of Shelby County, and they have brought their case to this Court by appeal in error.

It appears that the plaintiffs are wholesale merchants, who, in Cincinnati, Ohio, carry on the general business of selling building supplies, such as doors, blinds, etc., to contractors in building and repairing houses; and that the Terry Manufacturing Company is a concern of Nashville, Tenn., the business of which sometimes embraces such contracts; and that John T. Frost is a citizen of Memphis, and entered into a contract with his co-defendant to repair his dwelling-house, situate in said city, which was accordingly done.

From the agreed statement of facts it appears that on the sixth day of August, 1891, the said plaintiff received from the Terry Manufacturing Company an order for a lot of inside window-blinds, which, on the third day of September following, they filled, amounting to \$212.50, of which blinds to the amount of \$188.80 were afterwards proved to have gone into the Frost building in Memphis, upon which all statutory steps to preserve

the furnishers' lien, if any existed, were taken. It further appears that no other relation existed between the plaintiffs and the Terry Manufacturing Company than that of vendor and vendee, and that they had no knowledge as to what use the vendee intended to make of the goods.

It is provided by the first section of the Acts of 1889, Ch. 103, that "Section 2 of the Act of the Legislature of 1881, Ch. 67, above referred to in this caption, shall be amended so as to read as follows: 'Every journeyman or other person employed by such mechanic, founder, or machinist to work on the building, fixtures, machinery, or improvements, or to furnish material for the same, shall have this lien for his work or material; *Provided,*'" etc.

The present Act of 1889, Ch. 103, is only intended to apply to such mechanics, founders, and machinists as had a lien under Code (T. & S.), §§ 1981, 1981a, where the lien is created in the following words: "There shall be a lien on any lot of ground or tract of land upon which a house has been constructed, built, or repaired, or fixtures or machinery furnished or erected, or improvements made by special contract with the owner or his agent, in favor of the mechanic or undertaker, founder or machinist, who does the work or any part of the work, or furnishes the materials or any part of the materials, or puts thereon any fixtures, machinery, or material, either of wood or metal."

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Mills v. Terry Manufacturing Co.

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The obvious construction of this Act, and of those of which it is amendatory, is that such lien arises upon a special contract, as contemplated by the Acts. Such a lien does not follow a window-blind, like a shadow, as it passes from vendor to vendee, with no contract for its use in a particular building. A most liberal construction of the Act would not extend it to embrace the case presented by the plaintiffs.

The judgment of the Circuit Court, having been in accord with this construction, is in all things affirmed, with costs.

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VanVleet v. Stratton.

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## VANVLEET v. STRATTON.

(Jackson. May 5, 1892.)

1. GARNISHMENT. *Of debtor's wages ineffectual, when.*

Garnishment of an employer for the purpose of subjecting an employe's wages to his debts is wholly ineffectual where the wages were earned and paid over to the employe, between the dates of service of the garnishment notice and the rendition of the garnishee's answer, pursuant to a contract, made in good faith, whereby the employer agreed to and did pay his employe's wages in advance. Such wages are not "property, debts, and effects" of the employe within the meaning of the garnishment laws.

Code construed: §§ 3800, 3801, 3803 (M. & V.); §§ 3087, 3088, 3090 (T. & S.).

Cases cited and approved: Mayor, etc., v. Potomac Ins. Co., 2 Bax., 296; Pickler v. Rainey, 4 Heis., 339; 117 Mass., 238; 38 Conn., 290; 51 Mich., 115.

2. SAME. *Same. Good faith of contract.*

And such contract between employer and employe is not fraudulent or illegal, although it was well understood by the parties making it that the stipulation for payment of wages in advance was intended to protect them against garnishment, and thereby enable the employe to support his family and pursue his vocation. The obligation to support one's family is of a higher order than the obligation to pay one's debts.

Cases cited and approved: Leslie v. Joiner, 2 Head, 515; Hamilton v. Zimmerman, 5 Sneed, 39.

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FROM SHELBY.

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Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

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VanVleet v. Stratton.

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THOMAS H. JACKSON for VanVleet.

M. R. PATTERSON and GANTT & PATTERSON for  
Stratton.

W. A. HENDERSON, Sp. J. On May 9, 1891, the defendants in error recovered a judgment against one Sheats for \$75.25 before a Justice of the Peace for Shelby County. On this judgment an execution was sued out May 27, 1891, and, no property having been found, garnishment was, on that day, served upon the plaintiffs in error, commanding them to appear and answer on June 25, 1891, on which day the garnishees appeared, and filed answer that the said Sheats was indebted to them in the sum of \$124.50; that he was their employe, on a monthly salary of \$100 per month, and that no money had been paid him since the service of the writ of garnishment. On this answer the garnishees were discharged, but immediately an alias execution was issued, and another garnishment was served upon the plaintiffs in error, notifying them to answer on July 25, 1891, on which day they filed, answer, setting forth that, since June 25, 1891, the debtor had earned in their employment, and had been duly credited with, the sum of \$100, and that they had loaned him \$100 since that date, and that he was, on that date, indebted to them in the sum of \$104.50. On this answer the garnishees were again discharged. Immediately a pluries execution was issued, and another garnishment served, notify-

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ing plaintiffs in error to appear and answer on August 25, 1891, when they appeared and filed substantially the same answer, upon which the Justice rendered judgment against the garnishees, who appealed the case to the Circuit Court.

On the trial in the Circuit Court, the plaintiffs in error appeared, and, upon oral examination, substantially stated that what was meant by the statement that \$100 had been "loaned" the debtor, and the truth of the matter was, that, upon the service of the first garnishment, the debtor, who was one of their employes, came to them, and, in substance, stated that he had a family to support, and if his monthly salary was to be tied up or absorbed in this way he would be compelled to abandon their employment and seek a livelihood in some other way elsewhere; that they desired his services, and, in order to retain them, agreed to pay his monthly wages in advance, which had been accordingly done.

Upon this answer, His Honor, the Circuit Judge, rendered judgment against the garnishees. This was erroneous. To authorize such a judgment, it must clearly and obviously appear that the garnishees were indebted to the debtor, or that a debt had existed, which had been seized and impounded by the garnishment. Obviously, the garnishees were not then indebted, nor, so far as this record shows, had they ever been. 2 Bax., 296; 4 Heis., 339.

The judgment is defended before us on a charge



of fraud against the parties. It is ingeniously and ably argued that the debtor was under obligation to pay this debt, and that, in order to hinder and delay the collection of it, a covinous arrangement was entered into by which the garnishees agreed with the debtor to pay him in advance for his labor, instead as had theretofore been done.

We are not persuaded that this was fraud. It is true the debtor was under obligation to pay the debt, but he was under higher legal and moral obligation to support his family. 2 Head, 515; 5 Sneed, 39. To comply with this obligation, there is nothing illegal nor immoral in demanding pay for one's services in advance.

As to the plaintiffs in error, they were under no obligation whatever to the defendants in error. What right has a creditor to say to an employer, "You must not pay your employe in advance, but allow his wages to accumulate, so that a fund may arise in your hands from which I may realize my debt?"

One question remains. Of course, if, at the time of the service of the garnishment, a debt was *in esse*, due or undue (questions as to negotiable and assignable paper being out of the way), the same may be seized and impounded; but if nothing whatever is due, nor any debt exists not yet due, may you summon an employer before a Justice month by month, or before a Court term by term, and thus prevent any payment of wages to him, as was attempted in this case? Can this writ

place the defendants in error on higher grounds than the debtor with reference to his employer? Drake on Attach., 458.

The execution of a writ at law cannot seize a thing that has no existence. An after-born thing—for instance, a debt—cannot be born into a levy that had previously been made, unless it be controlled by a statute, clear and unambiguous in its terms. This principle is conceded in this case, but it is insisted that our statutes go to that extent. Mr. Drake commends such laws for the convenience of collecting debts, and quotes Alabama and Missouri as having passed such Acts.

We do not so construe our statutes. In Code, §§ 3800, 3801, great latitude is very properly given to the creditor as to what questions he may ask the garnishee, like a bill of discovery, which may help him in his search for assets. Yet, in the subsequent section, where it speaks, among other things, of “debts” as being held liable under the writ, it does not mean an intangible expectancy, depending on the will of the debtor, but a chose in action in existence at the moment of the levy. Drake on Attach., 559; 117 Mass., 238; 38 Conn., 290; Free. on Ex., Vol. I., Sec. 164; 51 Mich., 115.

This construction of the statute and of the answers of the garnishees compels a reversal of the judgment below.

Judgment will be rendered here for the garnishees, with costs.

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Pearcy v. Tate.

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PEARCY v. TATE.

(*Jackson*. May 7, 1892.)

1. REDEMPTION OF LANDS. *By administrator of lien-holder.*

The holder of a purchase-price lien upon land, or his administrator, has the right to redeem the land from a sale made subject to redemption under his prior mortgage or trust deed.

2. SAME. *Same. Case in judgment.*

P. conveyed his lands in trust to M. to secure a debt. He then sold and conveyed the same lands in fee, but subject to said trust deed, to his son, J., taking notes and retaining lien for the purchase-price. Afterwards the lands were sold under the trust deed, subject to the right of redemption. P. having died, his administrator, holding the purchase-price notes, redeemed the land from the purchaser at the trustee's sale.

*Held:* P.'s administrator had the right to redeem the land as holder of the purchase-price notes secured by lien thereon.

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FROM DECATUR.

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Appeal from Chancery Court of Decatur County.

A. J. ABERNATHY, Ch.

BULLOCK & ANDERSON and CARUTHERS & MALLORY  
for Percy.

T. P. BATEMAN and J. A. ENGLAND for Tate.

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CALDWELL, J. This is a bill to rescind and vacate a redemption of land, and to assert and protect the title of complainant, from whom the redemption was made by defendant.

On March 3, 1886, John H. Percy, the original owner, executed a deed of trust, by which he conveyed the land in question to John McMillan, as trustee, to secure the payment of certain debts therein named. The trustee was authorized to make sale if the secured debts should not be paid by the first day of July, 1887.

On December 15, 1886, John H. Percy conveyed the same land, in fee, to his son, John W. Percy, for and in consideration of two thousand dollars, as security for which a lien was expressly retained in the face of the deed.

The latter conveyance referred to the former one in this language: "And this deed is subject to a deed of trust in the hands of John McMillan, Sr., and to be foreclosed by him, for the benefit of my creditors, the first of July, 1887. The amount to be paid is \$396. The deed of trust was dated March 3, 1886, and is registered," etc.

Only a small part of the consideration was paid at the time, four promissory notes being executed for deferred payments. The last three notes called for \$500 each, maturing, respectively, on December 25, 1888, 1889, and 1890. The first one was for a smaller sum, and contained significant words and figures, as follows:

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"\$396.00. On or by the first of July, 1887, I promise to pay John H. Percy the sum of \$396.00, to satisfy a deed of trust, John McMillan being the trustee in said deed."

John H. Percy, the vendor, died intestate in May, 1887. J. H. Tate was qualified as administrator of his estate in July, 1887, and, in November, 1887, filed a bill against John W. Percy, the vendee, to collect said first note, then past due, and the others as they should mature, and to enforce the lien against the land. That suit is still pending; but it need not be further noticed at present.

The debts secured in the deed of trust not having been paid, McMillan, the trustee, on September 3, 1887, sold the land to J. T. Percy, a son of John W. Percy, for \$405, the amount of the secured debts, with interest, and executed to him a deed.

The sale was subject to redemption, that right not having been waived by the maker of the deed of trust.

On October 2, 1888, long before the expiration of the two years allowed for redemption, Tate, the administrator of John H. Percy, deceased, redeemed the land, without suit, from J. T. Percy, paying him the full amount of his bid, with interest, and taking a receipt, reciting the fact of redemption.

More than a year thereafter, and when it was too late for any one else to redeem the land, J.

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T. Percy, on December 31, 1889, filed this bill, seeking a rescission and vacation of the redemption, on the alleged ground that the administrator of John H. Percy had no right to redeem, but had fraudulently misled complainant in that regard; and seeking, further, to have complainant's title, under his purchase from the trustee, declared perfect, and to perpetually enjoin the prosecution of the suit against his father for the collection of the purchase-money notes belonging to the estate of the original vendor, John H. Percy.

The administrator answered the bill, denying all charges of imposition, and insisting that his redemption of the land was rightful and valid.

Hearing the cause upon these pleadings and the proof, the Chancellor granted the relief sought in the bill; and from his decree the defendant appealed.

The decree is erroneous, manifestly. John H. Percy did not part with the whole of his interest in the land by his conveyance of the fee to John W. Percy. He retained an express lien in the face of the deed as security for the payment of the purchase-money. Having retained such a lien, and it still subsisting at the time of the trustee's sale, John H. Percy, the vendor, had such an interest in the land that he would have been entitled to redeem it himself had he lived. Having died, and the lien continuing as a security for the purchase-money notes, his administrator, into whose hands those notes came for ad-

ministration, became entitled to the same right of redemption for the benefit of the estate.

The redemption so accomplished simply relieved the land of the incumbrance of the deed of trust, and preserved the lien in favor of the estate of John H. Percy, without vesting any personal right in his administrator.

Confessedly, John H. Percy, in his life-time, or his administrator after his death, had a legal right to redeem the land from the trustee before foreclosure, by paying the secured debts and thereby extinguishing the deed of trust; and, upon all just and fair reasoning, the right of either to redeem *after* foreclosure must have been the same as it was *before* foreclosure—nothing more, nothing less—the right of redemption after sale not having been waived.

So far as this question is concerned, there is no distinction between a deed of trust and a mortgage as a security for debt, the right of redemption existing whether the conveyance of the debtor's land be in the one form or the other. His interests are the same, and demand the same protection in the one case as in the other.

Speaking generally, any person interested in the land conveyed by mortgage or deed of trust, and whose interest would be prejudiced by a foreclosure, may redeem from the mortgagee or trustee, so as to disengage the property and make it available for his own use, or for the protection of that interest; and any person with the same measure

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of interest in the property may, to the same end, redeem it after foreclosure, if the right of redemption be not waived, and the application be made within two years after sale. As, in the case at bar, John H. Percy, the maker of the deed of trust, and subsequent vendor of the land, or his personal representative, for the benefit of his estate, had a right to redeem before or after foreclosure, to protect his lien on the land, and John W. Percy, his vendee, had the right to redeem before or after foreclosure, to protect his legal title.

With reference to the right of redemption of mortgaged property, and as to the persons who may redeem from the mortgagee, Mr. Story says: "From what has been already stated, it is clear that the equity of redemption is not only a subsisting estate and interest in the land in the hands of the heirs, devisees, assignees, and *representatives* (strictly so called) of the mortgageor, but it is also in the hands of any other persons who have acquired any interest in the lands mortgaged by operation of law, or otherwise, in privity of title. Such persons have a clear right to disengage the property from all incumbrances, in order to make their own claim beneficial and available. Hence, a tenant for life, a tenant by the curtesy, a jointress, a tenant in dower in some cases, a reversioner, a remainder-man, a judgment creditor, a tenant by elegit, the lord of a manor holding by escheat, and, indeed, every other person being an incumbrancer, or having legal or equitable title or



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*lien* therein, may insist upon a redemption of the mortgage, in order to the due enforcement of their claims and interests respectively in the land." 2 Story's Eq. Jur., Sec. 1023.

On the same subject, Mr. Pomeroy says: "Any person who holds a legal estate in the mortgaged premises or in any part thereof, derived through, under, or in privity with the mortgageor, and any person holding either a legal or equitable *lien* on the premises or any part thereof, under or in privity with the mortgageor's estate, may also in like manner redeem from the prior mortgage." 3 Pomeroy's Eq. Jur., Sec. 1220.

The cases relied on by complainant's counsel are not in point, as against the right of the administrator in this case to redeem.

It is true, as contended, that a sale by a judgment debtor of his lands which had been sold at execution sale, within the two years allowed for redemption, without previously having redeemed himself, is, in effect, merely a sale of his equity of redemption, although his conveyance purports to be a sale of his entire title (*McClellan v. Hardison*, 14 Lea, 510); and that the conveyance of land in fee, *without reservation* of any right or interest, by a debtor who had previously conveyed the same land in trust for the benefit of creditors, passes his entire interest in the land, and includes the right of redemption, though not especially mentioned. *Graves v. McFarlane*, 2 Cold., 167. But it does not follow, and cannot be true, that a

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mortgageor who, during the life of his mortgage, conveys the mortgaged premises in fee, *with an express reservation* of a lien to secure unpaid purchase-money, thereby divests himself of all interest in the land, and cuts himself off from the right of redeeming from the mortgagee.

The existence of the lien carries with it the right of redemption.

The injustice of a different ruling would find a striking illustration in the facts of this case.

Reverse and dismiss the bill, with costs.

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Gurley v. Railroad.

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## GURLEY v. RAILROAD.

(Jackson. May 10, 1892.)

1. APPEAL. *Does not lie, when.*

In suit for personal injuries the defendant pleaded (1) not guilty; (2) gross contributory negligence of the plaintiff; (3) accord and satisfaction. The plaintiff joined issue upon the first two pleas, and filed replication to the third plea. Defendant's demurrer to this replication was sustained. From this action of the Court, without any judgment disposing of the suit, the plaintiff appealed.

*Held:* The appeal is premature. The judgment was not final. It did not dispose of the entire case. It was not such judgment as the Court may grant appeal from before final judgment in the exercise of its discretion.

Code construed: §§ 3872-3874, 3893 (M. & V.); §§ 3155-3157, 3174 (T. & S.).

Case cited and approved: *Younger v. Younger*, 90 Tenn., 25.

2. JURISDICTION. *Not conferred by consent.*

And jurisdiction cannot be conferred upon this Court in such case by consent of parties.

Case cited and approved: *Gibson v. Widener*, 85 Tenn., 16.

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FROM SHELBY.

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Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

W. P. WILSON for Gurley.

HOLMES CUMMINS for Railroad.

CALDWELL, J. Gus Gurley sued the Newport News and Mississippi Valley Railroad Company for ten thousand dollars, as damages for personal injuries alleged to have been inflicted upon him by the defendant, while he was in its service in the capacity of conductor of one of its railway trains.

To the declaration, defendant filed three pleas: (1) Not guilty; (2) gross carelessness and misconduct on the part of plaintiff, whereby he brought his misfortune upon himself; (3) accord and satisfaction.

Plaintiff joined issue upon the first and second pleas, and filed a replication to the third plea. Defendant demurred to the replication. The Court sustained the demurrer, and from that action, without more, plaintiff appealed in error.

The attempted appeal was premature, and, therefore, conferred no jurisdiction upon this Court.

Appeals as a matter of right, and appeals in the nature of a writ of error, lie from *final* decrees and judgments only; and *final* decrees and judgments are only such as decide and dispose of the whole merits of the case. Code (M. & V.), §§ 3872, 3873, and 3893; *Younger v. Younger*, 90 Tenn., 25.

The judgment sustaining the demurrer to the replication was not *final*; it did not decide and

dispose of the merits of the whole case. On the contrary, it adjudged simply that the replication was not good in law, and left all other questions undisposed of and undecided.

The plaintiff had a right to plead further, but he did not offer to do so. He might have denied the truth of the third plea, and in that way made an issue for the jury; or, upon his failure to plead over, the Court might have rendered final judgment, and dismissed the suit. Nothing of this kind was done or attempted to be done. There was no order to plead further—no request for that privilege; there was no declination to plead over, no judgment on the plea and dismissal of suit.

The Court only adjudged the demurrer good and the replication bad. From that action, and at that stage of the case, the plaintiff attempted to appeal in error.

It is not, and could not reasonably be, claimed that this is a discretionary appeal under § 3874 of the Code.

The defendant also desires the judgment of this Court upon its demurrer, and offers to waive all objections as to the nature of the judgment below and time of the appeal. That does not help the matter. Jurisdiction cannot be conferred by consent. *Gibson v. Widener*, 85 Tenn., 16.

Let the appeal be dismissed for prematurity.

RAILROAD v. CRIDER: SAME v. BARBOUR. SAME  
v. TURNER. SAME v. CLAYBROOK.

(Jackson. May 10, 1892.)

1. RAILROADS. *Statute making unfenced absolutely liable for injuries to live-stock by moving trains constitutional.*

Acts 1891, Ch. 101, fixing upon unfenced railroads absolute liability for injuries done to live-stock by their moving trains, is constitutional and valid, both as a whole and in its details, when its scope and purpose are ascertained by a correct construction. This Act should not be treated as a mere scheme for the speedy collection of damages for injuries to live-stock, although that is incidentally provided for. Its chief purpose is to prevent accidents on railroads, and, viewed from this higher ground, it is a proper and legitimate exercise of the police power of the State. (*Post*, p. 492 et seq.)

Act construed: Acts 1891, Ch. 101.

Cases cited and approved: 26 Mo., 441; 65 Me., 333; 27 Vt., 140; 115 U. S., 522; 20 Wis., 267; 109 Ill., 402; 66 Pa. St., 164; 71 Mo., 434; 50 Iowa, 338.

2. SAME. *Same. Title of Act valid.*

And the title of said Act, though containing unnecessary details and particulars, is single, and embraces but one subject. That title is as follows: "An Act to require the section-masters of railroads to give notice of the killing or injury of live-stock by the trains or locomotives of railroads in Tennessee; to provide for the appointment of appraisers to ascertain and fix the value of such stock, or the amount of injury thereto, and to provide for the collection of such appraisements; *to make railroad companies liable for all damages by reason of the killing or injury of live-stock upon or near their unfenced tracks by their moving trains, cars, or engines.*" The subject of this Act is fully expressed in the last clause in italics. The preceding clauses of the title were unnecessary, but embracing only particulars germane to,

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 Railroads *v.* Crider *et al.*


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and included in, the general subject expressed in the last clause, they do not vitiate the title or the Act. (*Post*, pp. 493, 494.)

Constitution construed: Art. II., Sec. 17.

Act construed: Acts 1891, Ch. 101.

Cases cited and approved: Luehrman *v.* Taxing District, 2 Lea, 425; Griffin, *ex parte*, 88 Tenn., 547.

3. SAME. *Same. Not vicious class legislation.*

And said Act is not unconstitutional as vicious "class legislation," although its provisions confer benefits upon a limited class, to wit, owners of live-stock, and impose burdens upon a limited class, to wit, unfenced railroads. These classes are natural and not arbitrary. (*Post*, pp. 494-497.)

(See The Morris Claimants *v.* The Stratton Claimants, 89 Tenn., 500.)

4. SAME. *Same. Provision for appraisement of damages by freeholders valid.*

And that provision of said Act is valid which authorizes the appraisement of the damages done to live-stock by three freeholders appointed by a Justice of the Peace at the instance of the owner, and makes their report *prima facie* evidence of the value of the stock injured or killed. This is a mere regulation as to evidence, which it was competent for the Legislature to make. (*Post*, pp. 497-499.)

Constitution construed: Art. I., Sec. 8; Art. XI., Sec. 8.

5. SAME. *Same. Provision making railroad liable for plaintiff's attorney fee, valid.*

And that provision of said Act is valid which makes railroads wrongfully refusing to pay such appraisement liable for plaintiff's attorney fee, in addition to other damages, in any suit brought to recover the damages withheld. This is not obnoxious class legislation. It is an exercise of the police power of the State. But no fee is recoverable unless the appraisement is sustained. (*Post*, pp. 499-505.)

Cases cited and approved: 115 U. S., 523; 109 Ill., 537; 16 Kansas, 573; 20 Kansas, 660; 13 Am. and Eng. R. R. Cas., 650.

Cases cited and distinguished: 31 Am. and Eng. R. R. Cas., 555; 35 *Id.*, 162.

6. SAME. *Same. Same. Fee must be fixed by jury.*

But the amount of such attorney fee must, like other damages, be fixed by the jury or the Court sitting as a jury. The provision of said Act

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requiring the fee to "be fixed by the Court trying the case" is construed as providing for jury trial of this question, thereby saving the Act from unconstitutionality. (*Post*, pp. 505, 506.)

7. CONSTITUTIONAL LAW. *Doubtful construction of statute to be resolved in favor of its constitutionality.*

Doctrine re-affirmed and illustrated that where a statute is of doubtful meaning, it should receive that construction which is in harmony with the Constitution. (*Post*, p. 506.)

Cases cited and approved: *Hume v. Railroad*, 1 Cold., 74; *Cole Manufacturing Company v. Falls*, 90 Tenn., 466.

8. SAME. *Repeal of statute by implication.*

Doctrine re-affirmed and illustrated that the constitutional provision requiring laws repealing or amending former laws to recite in the caption or otherwise the law repealed or amended, does not apply to repeals or amendments which result from necessary implication. (*Post*, pp. 506, 507.)

Constitution construed: Art. II., Sec. 17.

Cases cited and approved: *Insurance Company v. Taxing District*, 4 Lea, 644; *Ballentine v. Mayor, etc.*, 15 Lea, 633.

CRIDER CASE.

Appeal in error from Circuit Court of Weakley County. W. H. SWIGGART, J.

FRANCIS FENTRESS and JOSEPH E. JONES for Railroad.

CHARLES M. EWING for Crider.

BARBOUR CASE.

Appeal in error from Circuit Court of Lauderdale County. T. J. FLIPPIN, J.



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Railroads *v.* Crider *et al.*

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HOLMES CUMMINS and THOMAS STEELE for Railroad.

W. E. LYNN for Barbour.

## TURNER CASE.

Appeal in error from Circuit Court of Tipton County. T. J. FLIPPIN, J.

HOLMES CUMMINS, SANFORD & YOUNG, and JOHN G. MILLER for Railroad.

BAPTIST & BOALES for Turner.

## CLAYBROOK CASE.

Appeal in error from Circuit Court of Lauderdale County. T. J. FLIPPIN, J.

HOLMES CUMMINS and THOMAS STEELE for Railroad.

JOHN P. GAUSE for Claybrook.

LURTON, J. These four cases have been heard together. They present but one question—the constitutionality of the Act of 1891, Ch. 101, making unfenced railroads liable for all damages to owners of live-stock killed or injured by moving trains of cars or engines.

The first objection which has been urged is that the act embraces more than one subject.

The title is as follows:

"An Act to require the section-masters of railroads to give notice of the killing or injury of live-stock by the trains or locomotives of railroads in Tennessee; to provide for the appointment of appraisers to ascertain and fix the value of such stock, or the amount of injury thereto, and to provide for the collection of such appraisements; *to make railroad companies liable for all damages by reason of the killing or injury of live-stock upon or near their unfenced tracks by their moving trains, cars, or engines.*"

The subject of this act is the liability of unfenced railroads for all damages resulting to live-stock killed or injured by moving engines or cars. This subject is clearly indicated by the last clause in the title, which we have indicated by italics. The preceding clauses of the title were unnecessary. They are but statements as to the subdivisions of the act, and point out the *measure* of the damages, and the *manner* in which these damages are to be *ascertained* and *enforced*.

When the object of an act is to subject railroad companies operating unfenced tracks to absolute liability for all damages resulting from their unfenced condition, we can see no reasonable objection to embodying in the same act the means by which this liability may be ascertained and enforced, as well as provision for the increase of such dam-

ages under conditions named in the Act. If the means are in themselves valid, their inclusion in the Act will not subject it to the inhibitions of the Constitution concerning bills containing more than one subject. So, if these subdivisions relating to details be germane, and related to the subject of the Act, their inclusion in the title, while unnecessary, will not operate to make it an Act having more than one subject. The well-settled rule is, that this provision of the Constitution should be construed liberally, otherwise it would operate to embarrass legislation without advancing the beneficial purpose intended, which was to prevent combinations of incongruous subjects in one bill, with the object of drawing to the support of the whole bill members who might wish to support but a part. Only the general object of an act need be stated in the title, but under such title all the details by which that object is to be attained may be included. *Luehrman v. Taxing District*, 2 Lea, 425; *Ex parte Griffin*, 88 Tenn., 547.

*Second.*—It is next objected that the Act is void as being class legislation, and obnoxious to Art. XI., Sec. 8, of the Constitution, which prohibits the passage of “any law for the benefit of individuals inconsistent with the general laws of the land,” etc.; and as prohibited by Sec. 8 of Art. I. as not being “due process of law,” or “the law of the land.”

Under this head it is urged: (1) That it is applicable only to a limited class of persons—un-

fenced railroads; (2) that it operates in favor of owners of live-stock only; (3) that it provides for an *ex parte* appraisement of values by a tribunal unknown to the law, which is to sit in secret and judge without a hearing; (4) that it makes the offending corporation liable for the fee of adversary counsel if it shall unsuccessfully contest its liability for the appraised value.

Many of these objections are predicated upon the assumption that the statute is a mere piece of machinery for the more speedy collection of live-stock claims against railroads. If this view of the Act be the true one, then it does present many very serious questions of constitutional law.

In our judgment the Act has a wider purpose and rests upon much higher and broader considerations.

The end sought by this legislation is the prevention of accidents on railways, by compelling the inclosure of the track in such manner as will prevent live-stock from going on the roads. Failure to fence is made conclusive evidence of negligence whenever live-stock is killed or injured upon such an unfenced road by moving engines or cars. The liability of the company for actual damages is made the consequence of the failure to fence; and if the offending company refuse to pay the *prima facie* value of such stock, as ascertained in the mode prescribed by the Act, then it is made liable for an increase in the damages to the extent of reasonable attorney's fees in the event it

shall unsuccessfully litigate its liability for such *prima facie* value.

The duty of, fencing, and the resulting liability for failure to perform such duty, is imposed, not so much in the interest of the owners of animals which may go upon an unfenced road, as in the interest of the general public, who are concerned that accidents shall be avoided, and public travel be made as safe as the exigences of that manner of transportation will permit.

The authority for requiring railroads to fence in their tracks is found in the general police power of the State. The duty may be imposed by an affirmative statute, and enforced by fines, forfeitures, and penalties; or it may be indirectly imposed, as in the Act under consideration, by subjecting unfenced roads to liabilities and penalties from which roads recognizing the duty are exonerated. The enormous power and great momentum of railway engines render such protection a reasonable requirement against the unnecessary destruction of private property and accidents to persons traveling by such conveyance.

"This police power of the State," says an eminent Judge, "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim, *sic utere tuo ut alienum non laedas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and man-

ner in which every one may so use his own as not to injure others. By this general police power of the State, persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State; of the perfect right in the Legislature to do which, no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned." Redfield, Ch. J., in 27 Vt., 140.

The constitutionality of such statutes has often been questioned, but they have been, it is believed, uniformly sustained as a valid exercise of the police power. *Gorman v. Pacific R. R. Co.*, 26 Mo., 441; *Wilder v. Maine, etc., R. R. Co.*, 65 Me., 333; *Tharpe v. Rutland R. R. Co.*, 27 Vt., 140; *Missouri Pacific R. R. Co. v. Humes*, 115 U. S., 522; *Blair v. Milwaukee, etc., R. R. Co.*, 20 Wis., 267; *Chicago, etc., R. R. Co. v. Dremser*, 109 Ill., 402; *Pa. R. R. Co. v. Reblet*, 66 Pa. St., 164; *Spealmon v. Mo. Pacific R. R. Co.*, 71 Mo., 434; *Small v. Chicago, Rock Island R. R. Co.*, 50 Iowa, 338; Am. and Eng. Ency. of L., Vol. 7, p. 910, and cases cited; and many other cases.

The objection that the Act creates a new judicial tribunal for the appraisement of values of stock killed upon an unfenced road is not well founded. If the valuation fixed by the board of appraisers was made conclusive evidence against the company, the act would be subject to severe criticism. But by the express terms of the statute this appraise-

ment is only made "*prima facie* evidence of the value of said stock, or damage as to that crippled." If the company admit its liability and pay this value, that is the end of the matter. If it chooses to contest either the valuation or its liability, it may do so, and every opportunity is afforded it to present its defenses. In such contest this appraisalment is only *prima facie* evidence of the single fact of value. It is not made evidence as to the ownership of the stock, nor that the stock was killed by the moving engines or cars of the defendant, nor that the track of the defendant road was unfenced. As *prima facie* evidence of value, it will stand in lieu of proof until some evidence contradicting it is submitted. When this is done, the question of value, like all other questions of fact necessary to make out the plaintiff's case, must be determined upon the preponderance of proof.

The fact that three sworn and disinterested appraisers, after examination of the animals, have agreed upon and certified to a certain valuation, is made by the statute *prima facie* evidence of the value. There can be no serious doubt as to the power of the Legislature to make such an appraisalment, although without notice, *prima facie* evidence of the truth of the appraisalment. Concerning the power of the Legislature, an eminent authority says:

"As to what shall be evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted, so long as its

regulations are impartial and uniform; but it has no power to establish rules which, under pretense of regulating the presentation of evidence, go as far as altogether to preclude a party from exhibiting his rights." Cooley on Const. Lim., side-page 368.

With the limitations stated, such statutes as the one in question have been uniformly upheld. Code, § 1301, which provides that the burden of proof shall be upon the railroad company, when sued for killing stock, to show that the accident was unavoidable, is a striking instance of an Act shifting the burden of proof to the extent of requiring the defendant to prove a negative. So, by another statute, the *ex parte* certificate of a Notary Public that he had made a demand and given notice of the dishonor of negotiable paper, is made *prima facie* evidence of the fact of such notice. So, statutes which make tax-deeds *prima facie* evidence that all the proceedings have been regular, have been upheld, although such deed would not otherwise have any such force or effect, and the party claiming under one would, at common law, have to establish the regularity of the successive steps leading to the deed. Statutes making defective records evidence of valid conveyances are of a similar nature.

*Third.*—Does the imposition of an attorney's fee, in case the railroad company unsuccessfully litigates, violate any constitutional right?

In our view, plaintiff can only recover such fee



in case there is a recovery of the appraised valuation. If he fails to sustain the appraisal, the defense has been, in part, just, and the defendant is not to be operated with any fee. But it is said that the effect of this provision is to compel the company to pay the appraised value or submit to the imposition of a penalty in case it elects to exhibit its defenses in the Courts of the country and shall be unsuccessful. It is urged that this is the imposition of a burden upon one class of litigants in favor of another, and violates the constitutional rule which requires equality of right, privilege, and exemption. These objections overlook the fact that this legislation is intended to compel railroad companies to fence in their tracks; and that the liability imposed is a consequence of the failure of the offending company to adopt so necessary a means toward the protection of the property of others, and as a precaution against accidents resulting from the presence of animals on the road, thus endangering the safety of those controlling and those using so dangerous a mode of conveyance. If the State may, in the exercise of its police powers, compel all railroad companies to fence in their tracks, it may enforce such policy by making the offending company liable to all who sustain injury by neglecting such precaution. To this effect is the line of decisions we have already cited. To attain this end, it is not obliged to stop at mere compensation, for it may blend public and private in-

terests by permitting a recovery in excess of actual damages.

This principle finds illustration in the common law, which permits, in cases where the wrong is so gross as to demand punishment, a recovery of a sum in excess of mere compensation, as exemplary or punitive damages. In many cases where such damages are admissible, the interests of society and of the person injured are united, and this additional damage inflicted is permitted to be taken by the individual injured, although it is imposed as a punishment in the interest of the public.

If at common law the damages inflicted upon a wrong-doer may be in excess of mere compensation, whenever the interests of society are affected or are to be subserved, it must be obvious that the law-making power may prescribe the measure of such additional damage and determine its disposition.

Upon this ground, statutes imposing double damages against unfenced railroads have been sustained as within the police power of the State. In the case of *Railroad v. Humes* the constitutionality of a statute of Missouri imposing double damages upon unfenced railroads for live-stock killed or injured, was involved. The statute had been sustained by the Court of Missouri. Upon writ of error to the United States Supreme Court, a similar conclusion was reached. The provisions of the Constitution of the United States in regard to "due process of law," etc., being substantially

identical with that in the Constitutions of both Missouri and Tennessee.

"The power of the State," said that Court, "to impose fines and penalties for a violation of its statutory requirements is coeval with government, and the mode in which they shall be enforced, whether at the suit of a private person or at the suit of the public, and what disposition shall be made of the amount collected, are merely matters of legislative discretion. The statutes of nearly every State in the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The injury actually received is often so small that in many cases no effort would be made by the sufferers to obtain redress, if the interest were not supported by the imposition of punitive damages." 115 U. S., 523.

The State has not, by this Act, imposed double or triple damages, as it might have done, but it has subjected the offending company to actual damages, and to an increase of this damage to the extent of the reasonable attorney's fees incurred by the successful plaintiff in the establishment of his claim. This additional penalty is not imposed except upon the contingency that the company shall

refuse settlement upon the basis of the *prima facie* valuation, and upon the further condition that the owner of the live-stock killed or injured shall establish both the liability of the company and that the appraised value was not excessive. What the State may impose as a penalty without condition, it may impose subject to condition. The measure of the damages for failure to fence, as well as the disposition of any recovery in excess of actual compensation was wholly within the legislative discretion. The addition or increase of damages, in case the company unsuccessfully contests its liability for the full amount of the appraisal, is to be measured by the reasonable expense thrown upon the plaintiff in what is thereby established to have been an unnecessary litigation.

The view we have taken of this Act, its objects and scope, excludes the assumption that the statute is one merely imposing a burden upon one class of litigants not borne by all others. The subject of the legislation being within the police power of the State, it is not objectionable that additional or increased damages are imposed upon such terms and subject to such contingencies as the public interest shall demand.

Our Code furnishes many illustrations of the imposition of penalties and forfeitures under the police power of the State. In some cases such penalties are turned over to the relator, though he have no special interest. In others, the recovery is divided between the State and the party

suing; and in still others, the State retains the whole.

We have been cited to two cases which are supposed to support the contention of the learned counsel that the imposition of the reasonable fee of an attorney is invalid, as partial legislation. *Railroad v. Williams*, 31 Am. and Eng. R. R. Cases, 555; *Wilder v. Railroad*, 35 Am. and Eng. R. R. Cases, 162. The first is an Arkansas case, and arose under a statute of that State entitled, "An Act to provide for the settlement of claims for stock killed or injured by railroads." The statute provided for an arbitration, and imposed the fees of adversary counsel in case the award was not paid. The case is to be distinguished from this in many particulars. The Act was not one intended to compel the fencing of railroads, and was purely an effort to compel submission to an award. The other arose under an Act in its general scope very much like our own. The Court treated it alone from the stand-point that it was the imposition of a burden upon one class of litigants not imposed upon all others. The view we have taken, that such added liability was but the imposition of additional damages, and was a valid exercise of the police power, was never considered. Acts similar to our own in respect to this feature have been sustained by reasoning more satisfactory to us. *Railroad v. Duggan*, 109 Ill., 537 (S. C., 20 Am. and Eng. R. R. Cases, 489); *Railroad v. Mower*, 16 Kansas, 573; *Railroad v. Shirley*, 20 Kansas,

660; *Railroad v. Olney*, 13 Am. and Eng. R. R. Cases, 650.

*Fourth.*—In the case of *Railroad v. Crider*, the learned Circuit Judge construed this Act as requiring the Judge trying the case to adjudge what should be reasonable attorney's fees, and to add such fee to the amount of plaintiff's recovery as determined by the jury. In the other cases heard along with the Crider case, but coming from a different circuit, the question of the amount of the fee was submitted to the jury. The contention now made is, that the Act requires the amount of such additional damage to be fixed by the Judge, and that the defendant is therefore denied the right of jury trial. The language of the Act concerning this matter is that this fee shall "be fixed by the Court trying the case." The meaning of "Court" depends upon the connection in which it is used. It may refer to the place where justice is judicially administered. The term, as defined by Mr. Bouvier in his dictionary, is this: "The presence of a sufficient number of the members of a body in the government, to which the public administration of justice is delegated, regularly convened in an authorized place, at an appointed time, engaged in the full and regular performance of its duties."

To determine whether the term is used as signifying the Judge alone, or the tribunal, which may consist of Judge and jury, resort must be had—if the term be used with reference to the

form of trial—to the nature of the questions submitted and to the mode generally in use in the tribunal for the trial of similar questions. Clearly, if the case is one in which a jury trial is permissible, and the other matters involved have, in fact, been submitted to a jury, then this matter of the amount of such fee is to be submitted likewise to the jury. The “Court trying the cause,” in that event, would be the Judge and jury. To construe this clause otherwise would be to suppose that the Legislature intended, in a jury case, to withdraw one question of fact and submit it to the Judge alone. When an Act is of doubtful meaning, that construction should be given to it which shall be found in harmony with the Constitution. *Horne v. Railroad*, 1 Cold., 74; *Cole Mfg. Co. v. Falls*, 90 Tenn., 466.

*Fifth.*—It has been urged that this statute is invalid because it amends in part, and repeals in part, Code (M. & V.), §§ 1298, 1299, and 1300, without reciting or otherwise mentioning the amended or repealed laws, and that this is prohibited by Art. II., Sec. 17, of the Constitution.

The sections of the Code referred to are those requiring all railroad companies to observe certain precautions against accidents, and making them responsible for all damages resulting from failure, and exonerating them from liability for damage to persons or property when in the observance of the statute.

The effect of this legislation upon unfenced

railroads, and as to the animals mentioned in the Act, greatly modifies the former law. But this is brought about by the conflict between an affirmative statute laying down definitely a new rule, and the old law. The effect may necessarily be the repeal, modification, or amendment of the law as it formerly stood.

The constitutional provision requiring laws repealing or amending former laws to recite in the caption or otherwise the law repealed or amended, does not apply to repeals or amendments which result from necessary implication. *Home Insurance Co. v. Taxing District*, 4 Lea, 644; *Ballentine v. Mayor*, 15 Lea, 633.

The judgment in the Crider case must be modified by excluding the attorney's fee added to the verdict by action of the Circuit Judge.

The judgments in the other cases will be affirmed.



91	508
110	611

91	508
116	514

## RAILROAD v. SADLER. SAME v. WOODRUFF.

(Jackson. May 10, 1892.)

RAILROADS. *Construction of Acts 1891, Ch. 101.*

Live-stock killed or injured by running upon and falling from a trestle in consequence of fright caused by a moving train are not "killed or crippled by any train of cars or locomotive" within the meaning of the Acts 1891, Ch. 101, making unfenced railroads absolutely liable for live-stock killed or injured upon or near their tracks by actual collision with their moving trains. Only cases of killing or injury of live-stock by actual collision with moving trains, etc., are within said Act.

Act construed: Acts 1891, Ch. 101.

Cases cited and approved: Holder v. Railroad, 11 Lea, 176; 22 Am. and Eng. R. R. Cas., 565; 13 *Id.*, 570; 19 *Id.*, 610; 23 *Id.*, 188; 31 *Id.*, 512, 569.

## SADLER CASE.

Appeal in error from Circuit Court of Weakley County. W. H. SWIGGART, J.

JOSEPH E. JONES for Railroad.

CHARLES M. EWING for Sadler.

## WOODRUFF CASE.

Appeal in error from Circuit Court of Weakley County. W. H. SWIGGART, J.

BARR & JONES for Railroad.

WINSTEAD & THOMAS for Woodruff.

LURTON, J. The Act of 1891, Ch. 101, making unfenced railroads absolutely liable for all stock killed or injured on or near their tracks applies only to injuries resulting from actual collision with a moving engine or car. The language of the Act forbids any other construction. The injury must be the direct result of contact with "moving trains, cars, or engine." This construction had been given to the old law. Code (M. & V.), §§ 1298-1300; *Holder v. Railroad*, 11 Lea, 176.

The later Act is no more explicit on this point than the former. Similar acts in other States have been uniformly construed as applicable only to cases of injury from direct collision.

Numerous cases are cited to this effect in the seventh volume Am. and Eng. Ency. of Law, 928.

To the same effect are the following: *Burlington and Missouri Railroad v. Shoemaker*, a Nebraska case, reported in 22 Am. and Eng. R. R. Cases, 565; *Holder v. Chicago, etc., R. R. Co.*, 13 Am. and Eng. R. R. Cases, 570; *Croy v. Louisville, etc., R. R. Co.*, 19 Am. and Eng. R. R. Cases, 610; *Knight v. N. Y. & Western R. R.*, an opinion of Court of Appeals of New York, 99 N. Y., 25 (S. C., 23 Am. and Eng. R. R. Cases, 188); *International & G. N. R. R. v. Hughes*, a Texas case, reported in 31 Am. and Eng. R. R. Cases, 569; *Penn. Co. v. Dunlap*, Supreme Court of Indiana, reported in 31 Am. and Eng. R. R. Cases, 512.

In these cases the animals seem, from fright, to

have run ahead of the moving train and onto a trestle, from which they fell, not being touched by the moving train.

The charge was erroneous upon this point, and for this error both cases must be reversed.

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Memphis v. Carrington.

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## MEMPHIS v. CARRINGTON.

(Jackson. May 19, 1892.)

1. TAXATION. *Of insurance agencies by city. Construction of ordinance*

The tax is laid upon insurance agencies, and not upon insurance companies, by the clause in the Act authorizing creation of taxing districts which imposes a privilege tax of \$200 per annum for each company represented, "upon the privilege of opening and establishing an office or agency for the insurance of fire, life, or accident in the taxing district for companies not chartered by the laws of the State of Tennessee."

Acts construed: Acts 1879, Ch. 84.

Cases cited: Insurance Company v. Taxing District, 4 Lea, 644; 120 U. S., 489; 10 Wall., 566.

2. REPEAL OF STATUTES. *Not effected by implication, when.*

And hence said tax upon insurance agencies for municipal purposes is not repealed by implication by the imposition of taxes upon insurance companies in subsequent tax-laws providing revenue for State and county purposes in these terms, to wit: "That all insurance companies shall pay to the Insurance Commissioner the following taxes in lieu of all other taxes, to wit: Two and one-half per cent. on gross premium receipts for foreign insurance companies." There is no necessary repugnancy between the two statutes.

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FROM SHELBY.

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Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

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Memphis v. Carrington.

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F. T. EDMONDSON and METCALF & WALKER for Memphis.

CRAFT & CRAFT and TURLEY & WRIGHT for Carrington.

LURTON, J. The defendants, Carrington, Mason & Sons and F. B. Hunter, are insurance agents, and have their office and agency established in the city of Memphis. These suits were brought to recover from them the privilege tax claimed to be due to the plaintiff under an Act of the Legislature, passed January 29, 1879, known as the "Taxing District Charter Act." The seventh section thereof is as follows:

*"Be it further enacted, That the following named kinds of business and occupations be, and the same are hereby, declared taxable privileges, and shall be taxed as herein provided, and the exercising of any of said privileges without first paying the tax hereby fixed, shall be a misdemeanor."*

Section 53 of the same Act is in these words: "Upon the privilege of opening and establishing an office or agency for the insurance of fire, life, or accident in the taxing district for companies not chartered by the laws of the State of Tennessee, \$200 per annum for each company represented, payable quarterly in advance."

This Act was amended in 1881, by Ch. 85, Sec. 18, so as to reduce said privilege tax from \$200 to \$100.

The defendants resist the collection of this tax,

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Memphis v. Carrington.

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upon the ground that Section 53, which imposes it, has been repealed by the revenue Acts of 1887, 1889, and 1891, each of which contains a provision substantially as follows: "That all insurance companies shall pay to the Insurance Commissioner the following taxes in lieu of all other taxes, to wit: Two and one-half per cent. on gross premium receipts for foreign insurance companies."

The first question which arises is as to whether this privilege tax is due from the agent personally or from the insurance companies represented. In view of doubts as to the proper construction of the Act in this regard, both the agents and the companies have been made defendants in the first case.

Upon careful consideration, we are of opinion that this tax is upon the privilege of opening and establishing an office or agency for the representation of foreign insurance companies. The insurance companies have not opened an office, but Messrs. Carrington, Mason & Sons have.

The business they propose to do is the representation of insurance companies not chartered by this State. The doing of such business, and the conducting of such an agency, is made a privilege. The tax is graduated by the number of companies represented.

Very many kinds of business and occupations are enumerated in the same Act, and made taxable privileges, such as auctioneers, steam-boat agents,

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Memphis v. Carrington.

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claim agents, real estate agents, etc. The tax, by the express words of the Act, is "upon the privilege of opening and establishing an office or agency \* \* \* for companies not chartered by the laws of the State of Tennessee."

The case of *Ficklin et al. v. Taxing District*, decided by this Court in 1889, and recently affirmed by the Supreme Court of the United States, is in point as to the proper construction of this section. In that case it appeared that Ficklin was engaged in and did business as a general merchandise broker, and, as such, was taxed under Sec. 9, Ch. 96, of the amended taxing district Act of 1881. Claiming to represent only foreign principals, Ficklin resisted the tax, upon the ground that it was a tax upon his principals, and, as such, a tax upon interstate commerce, and that the tax fell within the principle of the case of *Robbins v. Taxing District*, 120 U. S., 489. This Court thought the case was to be distinguished, in that Robbins represented a single firm as their agent or drummer, while Ficklin held himself out as a general merchandise broker, and that the tax was put upon the privilege or business of a general merchandise broker, and was not, therefore, in fact or in effect a tax upon the persons or firms represented by him.

This view was affirmed, the opinion not being yet reported. It is true that the question there was as to whether the tax was one upon interstate commerce, and that no such question can

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Memphis v. Carrington.

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arise here, inasmuch as the business of insurance is not commerce. *Liverpool and London Fire Ins. Co. v. Oliver*, 10 Wall., 566. But the case is applicable, in that the tax was held to be upon the agent personally, and not one upon the persons represented by him.

The case of the *Home Insurance Company v. Taxing District*, 4 Lea, 644, has been relied upon as determining that this tax is one upon the insurance companies, and not upon the agency. That was an agreed case, "to test the liability of the insurance companies doing business in the Taxing District of Shelby County to pay a privilege tax to the municipality." The sole question submitted and argued, and the sole question decided, as is shown by the opinion itself, was whether or not the Act of 1875, entitled "An Act to regulate the business of fire and all except life insurance companies," whereby a tax was imposed upon insurance companies which shall be in lieu of all other taxes, was repealed by section fifty-three of the subsequent taxing district Act of 1879. The Court was not called upon and did not determine the question here presented. The tax being imposed on the agent personally, and not on the company represented, it was not affected by the legislation regarding a tax upon the companies.

Judgment reversed, and judgment here in accordance with this opinion.



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Starnes v. Railroad.

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## STARNES v. RAILROAD.

(Jackson. May 26, 1892.)

1. COMMON CARRIER. *Contract fixing value of live-stock shipped, valid.*

Doctrine re-affirmed that a stipulation in a bill of lading for the shipment of live-stock, fixing values of the animals delivered for transportation, is valid, if fair and reasonable in itself, based upon a sufficient consideration, and freely and understandingly assented to by the shipper, although the values thus fixed are materially less than those shown by the proof.

Cases cited and approved: Railroad v. Sowell, 90 Tenn., 17; Railroad v. Wynn, 88 Tenn., 330; 112 U. S., 331.

2. SAME. *Construction of clause limiting value of live animals.*

Bill of lading for shipment of live-stock provided that in the event damage should occur for which the carrier would be liable, "the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a stallion or jack, \$200; for a horse or mule, \$100; \* \* \* which amounts, it is agreed, are as much as such stock as are herein agreed to be transported are reasonably worth." The proof showed that the thirteen horses shipped were worth, at date and place of shipment, from \$130 to \$235 each; and that nine of these were injured in course of transportation. Of the injured horses one died, and the value of the other eight were impaired from \$25 to \$100 each. All the injured horses brought over \$100, except one that brought \$90. The Court instructed the jury that the shipper could recover only \$100 for the dead horse, and \$10 for the injured horse that brought only \$90.

*Held:* Court's instructions are erroneous. Under said contract, the carrier was liable for damage done each horse to the extent of \$100, without regard to his value after receiving the injury.

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FROM SHELBY.

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Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

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Starnes v. Railroad.

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W. L. CLAPP and METCALF & WALKER for Starnes.

J. P. HOUSTON and McCORRY & BOND for Railroad.

CALDWELL, J. In June, 1889, J. W. Starnes delivered to the Louisville and Nashville Railroad Company, as a common carrier, thirteen horses, to be transported by rail from Lexington, Kentucky, to Memphis, Tennessee.

This action was brought by Starnes against the carrier to recover damages for injuries alleged to have been received by the stock in course of transportation.

Plaintiff claimed that he had been damaged to the extent of \$450, and sued for that amount. Court and jury allowed him a recovery for only \$110, with interest, and he appealed in error.

The horses cost the plaintiff, and were worth at place of shipment, \$130 to \$235 each. After much delay and circuitry of route, they reached their destination, nine of them being in a damaged condition. One of the nine died the next day after arrival, and the other eight were impaired in value from \$25 to \$100 each.

The horses were bought for sale on the Memphis market, and, there, those that survived were sold, at such prices as could be had by the exercise of due care and diligence. Eleven were sold for various sums above \$100 each, and one was sold for \$90.

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Starnes v. Railroad.

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The shipment was made under a "live-stock contract," which contained the following stipulation: "And it is further agreed that should damage occur for which the said party of the first part may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a stallion or jack, \$200; for a horse or mule, \$100; \* \* \* which amounts, it is agreed, are as much as such stock as are herein agreed to be transported are reasonably worth." This is a valid limitation of the liability of the carrier. *Railway Company v. Sorrell*, 6 Pickle, 17; *Railway Company v. Wynn*, 4 Pickle, 330; *Hart v. Penn. Railroad Company*, 112 U. S., 331.

With reference to it the trial Judge said to the jury: "This clause fixes the value of the stock at the point and date of shipment. So that, if you find from the evidence that any of the stock brought more than or as much as the agreed value of \$100 each, then the Court charges you there can be no recovery in this case for such stock as sold for \$100 per head."

Upon this instruction the jury returned a verdict for \$100 as damages for the horse that died, and for \$10 as damages for injuries to the one that sold for \$90; but refused a recovery for injuries to those which sold for as much as \$100 each. In other words, the jury did their plain duty, and applied the law, as given them by the Court, to the facts of the case.

But it is contended, and we agree, that the instruction was erroneous. The Court at this point should have told the jury that the stipulation limited the liability of the defendant to \$100 for each animal injured or killed, and that they should assess the damages according to the real injury caused by the carrier's negligence, in no instance exceeding \$100 per head.

The question is not, what did each animal bring in the market in its injured condition; but, rather, to what extent and in what amount, not above \$100, was it damaged through the fault of the defendant. Not what value is left in the animal, but what elements of value were wrongfully taken away. To illustrate: A horse shipped under such a contract loses one eye through the negligence of the carrier, and the owner sues for damages. The question, in such a case, is, How much has the animal been damaged by the loss of the eye? and not, Will he sell for as much as \$100 with but one eye?

The agreement is that the carrier shall not be liable for more than the \$100 in case of damage; not that no liability shall attach if the horse, though injured, should sell for as much as that sum.

The true measure of liability, under the contract, is the amount of actual damage resulting from the negligence of the carrier, in no case to exceed the sum stipulated. This is the most natural and reasonable construction of the contract; it is fair and just to both parties. A shipper

will not be heard to claim a recovery for damage or loss, however great, in excess of amount named in the bill of lading as the agreed value; nor will the carrier be allowed to deny liability for actual damage up to that amount. "The carrier must respond for negligence up to that value," but no further. 112 U. S., 341 and 343.

Reverse and remand.

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Hill v. State.

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## HILL v. STATE.

(Jackson. May 26, 1892.)

1. CRIMINAL PRACTICE. *Impeachment of defendant testifying in his own behalf.*

Doctrine re-affirmed that a defendant in a criminal case who testifies in his own behalf is subject to impeachment by the same method and to the same extent as other witnesses.

Case cited and approved: Peck v. State, 86 Tenn., 259; 29 Am. R., 506.

2. CRIMINAL EVIDENCE. *Cross-examination as to other charges against witness.*

Witness may be asked, on cross-examination, if he has been *indicted* for an infamous crime; but it is error to permit him to be asked, over objection, if he had been *charged* with such crime, without indicating in the question the manner in which the *charge* had been made.

Case cited and approved: Brasswell v. State, 3 Leg. Rep., 283.

3. SAME. *Same. Witness' explanation.*

If witness, in response to question on cross-examination, admits that he has been *charged* with an infamous crime, he is entitled to explain that he was not guilty of such crime, and his explanation and denial of guilt is conclusive, and not subject to rebuttal.

Cases cited and approved: Rocco v. Parczyk, 9 Lea, 331; Franklin v. Franklin, 90 Tenn., 44.

*Question reserved:* If witness denies that he has been *indicted* for infamous crime, may he be impeached by production of record?

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FROM CARROLL.

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Appeal in error from Circuit Court of Carroll County. JOHN R. BOND, J.

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Hill v. State.

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L. L. HAWKINS for Hill.

Attorney-general PICKLE for State.

CALDWELL, J. Plaintiff in error was convicted in the Circuit Court of Carroll County for carrying a pistol.

Under the recent statute, he went on the witness-stand and testified in his own behalf.

On cross-examination he was asked and required to answer, over objection, "if he had not been charged with stealing money from a negro in Huntingdon, and if he did not pay him back the money?"

He answered that he "had been charged with stealing money from a negro in Huntingdon, and had given the negro some money to stop the matter;" that "he did not steal the money," but "compromised the matter by paying some money," because "he did not want his father to hear of the charge."

Touching this evidence, the record recites: "The Court here stated to the jury that they would only look to the question as to the charge against the witness as affecting his credibility as a witness, and they would attach such weight to it as in their judgment it might be entitled to."

The action of the trial Judge was erroneous, both with respect to the form of the question and as to the effect to be given the answer.

*First.*—The question was incompetent, and should

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Hill v. State.

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have been rejected for ambiguity, in that it did not state whether the charge inquired about had been preferred in judicial proceeding, or by indictment of grand jury, or was the mere personal accusation of some individual. If the latter was meant, the inquiry was improper, for reasons too obvious to require enumeration. As tending to disgrace a witness, or show his unreliability, he may, with propriety, be asked if he has not been *indicted* for an infamous crime, as in the case of *Brasswell v. The State*, 3 Legal Reporter, 283; but that rule does not justify the question propounded in this case. Great as the latitude of cross-examination is, it does not warrant the investigation of mere personal imputations, which may be easily instigated and multiplied by unscrupulous persons, to the injury or destruction of any witness.

*Second.*—Instead of instructing the jury as he did with reference to this evidence, the Court should have told them that, inasmuch as the defendant denied the truth of the charge of larceny, they should not, for any purpose, consider the fact that such a charge had been made against him.

The matter sought to be introduced was entirely irrelevant and collateral to the offense for which the prisoner was being tried, and reflected no light upon it; for that reason his response was binding on the State. The Court required him to answer. After admitting that he had been charged as indicated in the question, the witness had a right to go further, and deny the truth of the charge.



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Hill v. State.

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Having done so, his denial was conclusive. 1 Wharton on Evi., Secs. 547 and 559; 1 Greenleaf on Evi., Secs. 449 and 459; *Rocco v. Parczyk*, 9 Lea 331; *Franklin v. Franklin*, 6 Pickle, 44.

Having put himself on the stand, the prisoner was subject to impeachment as any other witness would have been (*Peck v. The State*, 2 Pickle, 259; *State v. Clinton*, 29 Am. R., 506), but not further or otherwise.

His denial of the truthfulness of the independent charge should have ended that matter to all intents and purposes in this case. The jury should not have been allowed to consider the collateral charge in any way—as affecting his credibility or otherwise.

Whether the statement of a witness who denies that he has been indicted or convicted for a given offense may be disproved and his credibility impeached by production of the record, is a question quite different from that herein considered.

Reverse and remand.

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Cole Manufacturing Company v. Collier.

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## COLE MANUFACTURING COMPANY v. COLLIER.

(Jackson. June 4, 1892.)

- I. ARBITRAMENT AND AWARD. *Provision in building contract for submission to, not a bar to suit on the contract, when.*

A provision in a building contract that in case differences should arise between the parties "as to the quality of work or materials, or any other question that may arise under this contract, the same shall be settled by arbitration, each party selecting a good man; and, in the event of their disagreeing, these two shall select a third party, and their decision shall be final," constitutes no bar to a suit brought upon the original contract by a party who had failed or refused to make an effort for settlement of differences by arbitration.

Cases cited: 137 U. S., 370; 136 U. S., 242; 123 U. S., 40.

2. SUPREME COURT. *Will not revise lower Court's discretion in disallowing interest.*

Supreme Court will not reverse the judgment of the lower Court disallowing interest on the debt sued for, when the matter of allowing interest rested in the sound discretion of the court, and there is no manifest abuse of that discretion.

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FROM SHELBY.

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Appeal from Chancery Court of Shelby County.  
W. D. BEARD, Ch.

MYERS & SNEED for Cole Manufacturing Co.

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Cole Manufacturing Company v. Collier.

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W. M. SMITH, CASEY YOUNG, and GANTT & PATTERSON for Collier.

L. LEHMAN, Sp. J. The bill in this cause was preferred by the complainant, a corporation, to recover from the defendant, W. A. Collier, the price and value of labor and material performed and furnished in the construction of a building, under a written agreement entered into between them on November 14, 1889, the portion of which applicable to the question raised is as follows:

"It is further agreed that in case any difference should arise between the said Collier and the Cole Manufacturing Company as to the quality of work or materials, or any other question that may arise under this contract, the same shall be settled by arbitration, each party selecting a good man; and, in the event of their disagreeing, these two shall select a third party, and their decision shall be final. In consideration of the above, said Collier is to pay the said Cole Manufacturing Company nine thousand dollars (\$9,000), more or less, as the amount may be, which amount the said Collier will secure by deed of trust on nine acres of land in the Kinnay Heistand subdivision of land; said trust deed to be drawn at once, and held by E. C. Jones until said building is finished, when he will deliver the same to Mr. W. I. Cole."

W. I. Cole was the president of complainant company.

The bill further alleges the execution of the said trust deed and delivery of it to E. C. Jones; and the complainant therein also prayed that the said Jones, who is a defendant in the cause, and Collier be decreed to deliver up said trust deed; and also asked for the enforcement of the same to satisfy the amount owing by W. A. Collier to the complainant.

The bill contains averments of various demands made for the delivery of the trust deed, and a request on the part of the defendant, W. A. Collier, to have a submission and arbitrament of the claims of the plaintiff because of his dissatisfaction, stated in a general way, with the work done and materials furnished by the complainant, and which request, it is averred, was made, after considerable delay, subsequent to the completion of the building. The latter allegations are made in the bill in order to excuse the refusal of the complainant to submit the matters to arbitration.

The defendant, W. A. Collier, demurred to the bill, assigning, as ground therefor, the failure and refusal of the complainant to arbitrate differences under the provisions of the written agreement of November 14, 1889. Such demurrer was overruled by the Chancellor, and thereupon the defendant, W. A. Collier, filed his answer and cross-bill, in which he denied that the complainant had complied with said contract, and for cross-action set up, in a general way, without stating the amount thereof, damages accruing to him by reason of the com-

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Cole Manufacturing Company v. Collier.

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plainant's failure to comply with its contract, and arising from its failure to comply with its agreement to arbitrate.

The complainant made no objection to this cross-bill by demurrer or otherwise, but answered the same.

The Chancellor rendered his final decree, allowing the demand of the complainant, and ordering the delivery of said trust deed, and ordering the sale of the land embraced therein for the payment of the said demand.

Both parties have appealed. The defendant, W. A. Collier, appealed from the entire decree, and the complainant, the Cole Manufacturing Company, appealed from so much of the decree as excluded interest on the amount found due, from May 1, 1890, to January 1, 1891, or only allowed interest from January 1, 1891. The defendant, W. A. Collier, assigns for error that the Court below erred in overruling his demurrer and subsequently decreeing, on the pleadings and proof, that the agreement to arbitrate was not a bar to the suit.

We do not deem it necessary to consider whether the complainant, by allegation or proof, furnished an excuse or satisfactory reason for failing or refusing to submit any matter in controversy raised on either side to arbitration, under the provisions of the agreement of November 14, 1889. In the condition of this litigation, and under the rules of law controlling the issues made by the parties and the proof adduced, such inquiry is immaterial.

The position of the defendant is, that in the case of any difference or controversy between him and the complainant in relation to any of the matters contained in their agreement, no suit could be brought by the complainant until there had been an offer made to settle the controversy by arbitration; or, in other words, that an arbitration or an effort to arbitrate was a condition precedent to the right of the complainant to institute its suit. This contention is erroneous.

In *Hamilton v. Home Ins. Co.*, 137 U. S., 370, the policy of insurance on which the action was based, provided: "In case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award, in writing, shall be binding on the parties as to the amount of such loss or damage." The plaintiff had refused to enter into arbitration. The instruction of the trial Judge to the jury, that the plaintiff could not maintain his action because he had so refused, was adjudged erroneous.

In that case a number of decisions are cited, which establish the rule that the breach by the plaintiff of the agreement to submit to arbitration cannot be pleaded in bar of the action on the principal contract, unless such agreement expressly or by necessary implication made the submission a condition precedent to the institution of any suit.

*Hamilton v. Home Insurance Company* is distin-

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Cole Manufacturing Company v. Collier.

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guished by Mr. Justice Gray, who delivered the opinion therein, from *Hamilton v. Liverpool, London and Globe Ins. Co.*, 136 U. S., 242, wherein the policy involved contained an express condition that no action should be brought until there had been a submission to arbitration.

In the case of *The Excelsior*, 123 U. S., 40, which involved a liability in admiralty for salvage service, the parties had agreed to submit to arbitration the amount to be paid for the service. The defendant made the point that the suit could not be maintained because of the omission to submit to arbitration, and the Court held the objection to be ineffectual, and said that the remedy of the defendant, if any, would be in an action for breach of agreement to submit.

In this view of the case, it is also unnecessary to discuss or consider the inquiry whether this agreement to submit to arbitration was void, because it operated to oust the jurisdiction of the Courts.

We have fully investigated the evidence contained in the record as to the liability of the defendant, W. A. Collier, to the complainant for the amount claimed by the plaintiff, and have therefrom reached the conclusion that the complainant has fully established its claim, and that the defendant has failed to establish the items set up by way of cross-action in his cross-bill.

There was no error in the action of the Chancellor in refusing to allow the complainant interest

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Cole Manufacturing Company v. Collier.

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prior to January 1, 1891. That was a matter which, under established rules of law, rested entirely within the sound discretion of the Chancellor, and with the exercise of which we do not feel at liberty to interfere.

Let the decree of the Chancellor be affirmed. The costs of the Chancery Court will be paid as adjudged in the Court below, and the costs of this Court will be divided, one-half thereof to be taxed against the complainant, and the other half against the defendant, W. A. Collier.



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Meacham v. Meacham.

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MEACHAM v. MEACHAM.

(*Jackson*. June 7, 1892.)

1. PARTITION. *Of land by parol, valid. Statute of frauds. Registration.*

Parol partition of lands is valid. A partition is not a sale, and therefore not within the statute of frauds. A parol partition is not susceptible of registration, and therefore not within the registration laws.

Code construed: §§ 2423, 2890 (M. & V.); §§ 1758, 2075 (T. & S.).

2. HOMESTEAD. *In lands partitioned by parol.*

And hence the right of homestead exists in lands set apart in severalty to the head of a family under a parol partition.

Case cited: *J. I. Case Co. v. Joyce*, 89 Tenn., 337.

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FROM LAUDERDALE.

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Appeal from Chancery Court of Lauderdale County. H. J. LIVINGSTON, Ch.

THOS. STEELE for Complainant.

W. E. LYNN for Defendant.

L. LEHMAN, Sp. J. The defendant, Jesse Meacham, as appears from the record, on July 24, 1890, recovered a judgment against the complainant before

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Meacham v. Meacham.

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a Justice of the Peace in Lauderdale County, for the sum of \$435 and costs of the suit, and caused an execution issued thereon to be levied on the undivided six-sevenths of certain lands owned by the complainant and D. B. Norvel, who is joined as a defendant in the cause. Such execution, so levied, with the papers in the suit wherein the judgment was rendered, were filed in the Circuit Court of Lauderdale County for the purpose of having the said six sevenths of said land condemned and sold to pay the said judgment.

The complainant alleges in the bill that, prior to the levy of said execution, he and Defendant Norvel partitioned the said land by a *parol* partition, and set apart their shares thereof in severalty. The bill sets forth by proper description the part of the land which was, under that partition, allotted to the complainant as well as that which was assigned to Norvel.

It is further averred that the said land, so allotted to complainant, is worth less than \$1,000, and that he is the head of a family residing in this State, and is entitled to hold the same as his homestead, exempt from levy and sale under execution.

Upon the allegations of the bill, the sale of the land was enjoined *in limine*. The defendant, Jesse Meacham, demurred to the bill, on the ground that the alleged *parol partition* of the land was ineffectual as against a creditor of either of the tenants in common, which demurrer was by the Chancellor overruled.

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Meacham v. Meacham.

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The defendant, Jesse Meacham, answered the bill, denying the parol partition, and insisting upon its invalidity as to him, as a judgment creditor of the complainant. Proof was taken, and the allegations of the bill were established; and the Chancellor adjudged that the parol partition between the complainant and Norvel was valid, and that complainant was entitled to hold the land allotted to him, as a homestead, and that defendant, Jesse Meacham, was only entitled to subject the remainder interest therein to his judgment.

Under that decree the injunction, modified to the extent of allowing the land to be sold subject to the homestead of complainant, was made perpetual.

The defendant, Jesse Meacham, appealed to this Court, assigning for error the action of the Chancellor in adjudging the parol partition good, and allowing complainant a homestead in the land. Of course, if the contention to the effect that the parol partition was invalid, is correct, the decree of the Chancellor must be reversed. This is so because the homestead exemption does not apply to lands held by the debtor in common with another or others. *The J. I. Case Company v. Joyce*, 5 Pickle, 337. This contention of the appellant is put on the propositions that a parol partition contravenes the statute of frauds, and the registration statutes in force in Tennessee.

*First.*—Our statute of frauds (Code, § 1758) provides that “no action shall be brought upon any

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Meacham v. Meacham.

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contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized."

Is a parol partition within this section of our statute of frauds? A partition is not a sale. It is a separation between joint owners or tenants in common of their respective interests in land, and setting apart such interests, so that they may enjoy and possess the same in severalty. Partition, when procured by one tenant in common *in invitum* by judicial sentence, has never been treated as a sale or involving any of the elements of a sale.

At common law, tenants in common might make partition by parol. 17 Am. and Eng. Ency. Law, 667. Our statute of frauds has not changed this rule of the common law, and, consequently, it is yet in vogue in Tennessee. However, if a parol partition did fall within our statute of frauds, it ought not to be subject to attack by a creditor of one of the parties thereto. A verbal sale is not void, but only voidable, and can only, as a general rule, be avoided by the grantor or grantee.

*Second.*—Are the registration laws in the way of a parol partition as against a creditor of one of the tenants in common? The statute provides that instruments comprehended therein, not registered,

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Meacham v. Meacham.

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shall be null and void as to existing or subsequent creditors of the maker. Code, § 2075. Section 2030 of the Code says that "the following writings may be registered," enumerating them. Certainly the evidence of a transaction which is allowed to be done by the mere act of the parties, or which may rest *in pais*, cannot, in the very nature of things, be recorded or registered.

Conceding that a parol partition is good between the parties thereto, it would operate unjustly to permit creditors of one of the parties to disturb or set aside the partition, especially creditors who obtained judgments after the partition.

The decree of the Chancellor is correct, and his decree is affirmed.

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Insurance Companies v. Carrier Companies.

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## \* INSURANCE COMPANIES v. CARRIER COMPANIES.

(Jackson. June 7, 1892.)

1. REMOVAL OF CAUSES. *No separable controversy exists, when.*

In a suit by an insurance company against a carrier company to recover amount of insurance paid to a shipper on account of a loss by fire, for which the carrier was liable, and against which the carrier had protected itself by insurance in other companies (non-residents of the State where the suit is brought, and residents of different States or of a foreign government) made defendants in order to recover of them when the liability of the carrier was established, there is, as to the carrier's insurers sued, no separable controversy within the statute of the United States authorizing the removal of litigation from the State to the Federal Court. The right of complainant to sue and recover of the carrier's insurers is but incidental to its litigation with the carrier, and such a litigation against the insurers is in the nature of a garnishment proceeding against them, and stands on the same grounds, so far as the question of removal is concerned, as though these defendants were in fact garnishees.

Code construed: § 4200 (M. & V.); § 3461a (T. & S.).

Cases cited: 106 U. S., 99-108; 114 U. S., 60-62; 115 U. S., 56-61; 117 U. S., 280-282.

2. ILLEGAL CONTRACTS. *Of carrier as to rebates of freight charges.*

The Federal statute which forbids and declares unlawful all special rates, rebates, drawbacks, and preferences, is intended to make so much of a contract of affreightment void as related to the forbidden matter mentioned, but is not to be construed as making void an entire transaction of affreightment in which they were included, and excusing the carrier from any liability for freight received under such contract.

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FROM SHELBY.

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Appeal from Chancery Court of Shelby County.  
L. LEHMAN, Sp. Ch.

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\* Head-note prepared by Judge Snodgrass.—REPORTER.

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Insurance Companies v. Carrier Companies.

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TAYLOR & CARROLL for Complainants.

H. C. WARRINER and FRAZER & HEATH for Cross-complainants.

JOHN M. BUTLER for C. V. & C. Line.

HOLMES CUMMINS for N. N. & M. V. Co.

TURLEY & WRIGHT and METCALF & WALKER for Compress Co. and Fire Insurance Cos.

SNODGRASS, J. This suit results from the declaration of a liability (not adjudged, because the carrier was not before the Court) against the Cairo, Vincennes and Chicago Line, in the consolidated causes of *Deming & Co. et al. v. The Merchants' Cotton-press and Storage Co. et al.*, reported in 6 Pickle, 311.

The opinion in these causes, and those to which it refers, gives in full the history of facts out of which the present litigation grows, and none of these facts need be repeated here. It is sufficient to say that the Court then thought, and, on principles there settled, declared, as it now adjudges, that such line was and is liable. Nothing in this record, or in the argument upon it, affects the view there taken.

It also then adjudged, and now repeats, that the Cairo, Vincennes and Chicago Line was a necessary party to relief sought, incidentally and sec-

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Insurance Companies *v.* Carrier Companies.

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ondarily, against other defendants then before the Court and now before it.

This bill was filed on August 7, 1891, by marine insurers against proper representatives of that line, who entered appearance to litigate the merits of the unadjudged liability. The other defendants are the Merchants' Cotton-press and Storage Company and various fire and marine insurance companies.

On the merits of the controversy, the special Chancellor, Lehman, reached a conclusion as to the liability of the Cairo, Vincennes and Chicago Line and on other questions, in which we concur, including that of the non-liability of the Newport News and Mississippi Valley Company as to 948 bales of cotton; and the only question about which we have had any serious difficulty (in view of principles heretofore settled on other points) is that of jurisdiction, determined by the Chancellor before the hearing on the merits, and arises upon his refusal to permit the removal of the cause to the Federal Court upon the petition and bond of certain fire insurance companies, presented to the Court October 5, 1891, and amended November 21-23, 1891.

We hold that the real controversy in the case is between the marine insurers complaining and those for whom they sue, and the receivers of the Cairo, Vincennes & Chicago Line, defendants.

• The object of the controversy was to charge that line with loss sustained by shippers and paid



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Insurance Companies *v.* Carrier Companies.

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by these complaining companies, and incidentally to collect of other defendants—the fire companies—whatever decree might be obtained.

These defendants, though made such to the bill, as formal parties, occupied substantially the position of garnishees, and were made defendants only that their indebtedness on account of insurance obligations might be reached and held subject to such final decree as complainants might obtain against the Cairo, Vincennes and Chicago Line; and no separable controversy, in the sense of the statute, is thus presented or otherwise arises as to them on any proper re-arrangement of parties. *Bacon v. Rives*, 106 U. S., 99-108.

The position that this is, in fact, a suit between the Merchants' Cotton-press and Storage Company and the fire companies—being “virtually a suit by the former against the latter”—is not maintainable; nor that the decree must, of necessity, be in its name against such companies, for, though the decree might take that form, it is not essential that it should do so, as it may properly recite facts of failure and refusal of that company—the nominal assured—to sue and adjudge liability directly in favor of complainants after proper account stated, all parties being before the Court—the Merchants' Cotton-press and Storage Company as defendants.

The Merchants' Cotton-press and Storage Company, whose duty it was, as trustee, to sue for and collect and appropriate to proper parties the

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Insurance Companies v. Carrier Companies.

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insurance effected by it for them, having neglected and refused to do so, the marine insurers had, therefore, the right to join it as defendant, and make all the fire insurance companies defendants, and have exact liability of each fixed and adjudged in complainants' favor.

It may be true that complainants, after obtaining decree against the Cairo, Vincennes and Chicago Line, might have sued each fire insurance company separately for its proportion of the insurance, to which, by virtue of such recovery, complainants might have been authorized to subject it; but the same is true in respect to appropriation of indebtedness of garnishees; and yet it does not follow that, for such reason, such debtors may not all be proceeded against at the same time, and with a view to hold such indebtedness to satisfy a prospective recovery under the general principles of equity and under our statute (M. & V., Code § 4200), nor change the fact that the litigation with them is but incidental to the main controversy.

If complainants fail in that, no controversy remains, and no question for settlement between any parties to the suit. The marine insurers had no right of action against any of these fire companies except as incidental to its litigation with this carrier. These fire companies, in the language of *Railroad Company v. Wilson*, 114 U. S., 60-62, "are made parties only in aid of the principal relief which is asked," and "no relief whatever can be granted" unless a judgment is obtained against

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Insurance Companies v. Carrier Companies.

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the carrier, and "as to that controversy the carrier is an indispensable party." "The sole purpose of the suit" is to obtain the judgment and secure its collection. "The suit is therefore against both, on a single cause of action."

The quotations which we have made from the Wilson case are not, it is true, of a controversy exactly the same in fact, but we think the same in principle, as are also those of *Crump v. Thurber*, 115 U. S., 56-61; and *Fidelity Insurance, Trust and Safe Deposit Co. v. Huntington*, 117 U. S., 280-282.

This case, too, like the last one cited, is peculiarly one in which all the fire companies, with the defaulting trustee, the Merchants' Cotton-press and Storage Company, should have been joined. There was no separate insurance on particular cotton, or in favor of a particular owner or carrier.

The liability of each defendant is the object of an equitable account, and the recovery of each complainant depends upon it. Each insurer is in equity indebted to each carrier in some amount, and the Merchants' Cotton-press and Storage Company for the remainder, as decreed by the Chancellor.

Taking this view of the question, we have not deemed it essential to go into a discussion of other reasons assigned for the non-removability of this cause.

Presenting as it does a Federal question, which gives to the Supreme Court a revisory jurisdiction

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Insurance Companies v. Carrier Companies.

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on this point, where our *action* rather than our *opinion* will come in review, we are content merely to state our conclusions upon the ground indicated, and our concurrence in decree refusing removal on that ground, because all advanced and all not advanced by us will be gone over again if carried there, and the question determined without reference to that upon which our decision is placed, and we do not deem it necessary to extend this opinion if no appeal is taken.

One other point, however, on a question of Federal law is made, which it is proper to definitely state and decide. It is argued that the shipper and the carrier were, through their representatives, "engaged in an unlawful violation of the interstate commerce law, which forbids and declares unlawful all special rates, rebates, drawbacks, and preferences." Secs. 2 and 3, p. 529, Sup. to Rev. St., U. S.; Sec. 6, as amended by Act of March 2, 1889, pp. 684, 685. And an assignment of error is predicated upon this fact, to relief decreed the insurer. This fact of special rate and allowance of rebate is denied, and it is matter of controversy and conflict of evidence; and it is also insisted, in answer to this, by plaintiffs that the interstate commerce law does not apply, for the reason that the evidence disproves any "common control" over the river and rail route. We are of opinion, however, and rest our decision upon the ground, that if it were assumed that the law was applicable, and the fact of agreement for rebate and special rate

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Insurance Companies v. Carrier Companies.

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proven, it would not avoid liability on the part of the carrier for the freight received and covered by insurance in the hands of the carrier's agent.

The law makes such agreements as to rebates, etc., void, but does not make the contract of affreightment otherwise void; and we think there is nothing in the law or the policy of it which requires a construction that would excuse a carrier from all liability, when it made such a contract in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract, as to rebate, would be void, and, of course, agreed freight rate in violation of law could not be enforced, but we think the shipper could, nevertheless, recover for loss of his freight through the carrier's negligence, and incidentally of carrier's insurers. No different construction has yet been put upon the interstate commerce law, so far as we are advised, and we decline to give it any other.

Other questions made by counsel have all been considered.

We think there was no objection to the arrangement by which the receivers entered their appearance, or to their contract for carriage or for insurance or of misnomer, available to defendants.

Assignments of error not specially mentioned are overruled after full consultation. We are of

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*Insurance Companies v. Carrier Companies.*

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opinion there is nothing in any of them to prevent complainants recovering or change the decree of the Chancellor, and it is affirmed.

Both parties having appealed, are taxed equally with costs of this Court.

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117	765

MEMPHIS v. U. & P. BANK. SAME v. HERNANDO INSURANCE CO. SAME v. BLUFF CITY INSURANCE CO.

(*Jackson.* June 7, 1892.)

1. TAXATION. *Exemption clause in charter construed.*

Under charter granted prior to Constitution of 1870 to a bank or insurance company containing a provision "that said company shall pay to the State an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes," both the capital stock of the corporation and the shares of stock in the hands of the stockholders are exempt from all other taxes, whether *ad valorem* or privilege, imposed by State, county, or municipality. This decision rests alone upon the authority of *Farrington v. Tennessee*, 95 U. S., 679, so far as it is held that both capital stock and shares of stock are exempt under said provision. Except for the controlling authority of said case, this Court would determine otherwise.

Acts construed: Acts 1857-58, Ch. 166; Acts 1869-70, Ch. 93.

Cases cited and followed: *Farrington v. Tennessee*, 95 U. S., 679; *Bank v. Tennessee*, 104 U. S., 493.

Cited and approved or distinguished: *Memphis v. Farrington*, 8 Bax., 539; *Bank v. McGowan*, 6 Lea, 705; *State v. Butler*, 13 Lea, 406; *State v. Butler*, 86 Tenn., 633; *Memphis v. Hernando Insurance Co.*, 6 Bax., 527; *Bank v. Memphis*, 6 Bax., 415; *Bank v. State*, 9 Yer., 490; *Nashville v. Thomas*, 5 Cold., 600; 143 U. S., 195; 117 U. S., 136; 22 Fed. R., 80.

2. SAME. *Charter exemption from taxation, valid.*

Doctrine re-affirmed that a charter exemption from taxation, granted and accepted prior to Constitution of 1870, constitutes an inviolable contract binding upon the State, which cannot be impaired by subsequent legislation.

Constitution construed: Art. I., Sec. 20.

Cases cited and approved: *Memphis v. Farrington*, 8 Bax., 541; *State v. Butler*, 13 Lea, 408; *Bank v. State*, 9 Yer., 490; 4 Wheat., 519; 95 U. S., 684.

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 Memphis v. Bank and Insurance Cos.
 

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3. SAME. *Of capital stock and shares of stock not double taxation.*

Doctrine re-affirmed that the capital stock of the corporation and its shares of stock in the hands of its stockholders are separate and distinct property interests, and separate and distinct subjects of taxation; and that the taxation of both is not double taxation, nor the exemption of one necessarily an exemption of the other.

Cases cited and approved: Street Railroad Co. v. Morrow, 87 Tenn., 406; Bank v. State, 9 Yer., 490; Memphis v. Ensley, 6 Bax., 553; Gas-light Co. v. Nashville, 8 Lea, 406; 119 U. S., 277; 117 U. S., 135; 95 U. S., 687.

4. SAME. *Rule as to construction of exemption clauses.*

Doctrine re-affirmed that exemptions from taxation are never allowed by the Courts except upon "the clearest grant of organic or statute law," or unless "manifested by words too plain to be mistaken," or declared in "clear and unmistakable" language, or "be shown indubitably to exist." The existence of such exemption must be free from any reasonable doubt.

Cases cited and approved: Wilson v. Gaines, 9 Bax., 551; Railroad v. Gaines, 3 Tenn. Ch., 604; 16 How., 435; 18 Wall., 226; 21 Wall., 498; 95 U. S., 686; 117 U. S., 136; 109 U. S., 398; 143 U. S., 195.

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 FROM SHELBY.
 

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Appeal from Chancery Court of Shelby County.  
J. S. GALLOWAY, Probate Judge, sitting by interchange.

F. T. EDMONDSON and METCALF & WALKER for  
Memphis.

CRAFT & CRAFT for U. & P. Bank.



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Memphis v. Bank and Insurance Cos.

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## MORGAN &amp; McFARLAND for Insurance Companies.

CALDWELL, J. This is a bill by the State of Tennessee, on behalf of the city of Memphis, to recover from the Union and Planters' Bank \$48,576.25 as *ad valorem* taxes on its capital stock for the years 1887 to 1891, inclusive; or, in the alternative, to recover from the stockholders of the bank the same amount as taxes on the shares of stock held by them respectively during those years. Demurrer was sustained, and the bill dismissed. Complainant has appealed.

Defendants claim complete immunity from these taxes, by reason of a certain provision in the bank's charter from the State. That provision is as follows: "That said company shall pay to the State an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes." Acts 1857-58, Ch. 166, Secs. 10 and 12; Acts 1869, Ch. —.

With respect to this provision, the primary claim of the bill, and of complainant's counsel at the bar, is, that the charter tax of one-half of one per cent. was laid on *shares of stock*, and that the words, "which shall be in lieu of all other taxes," relate alone to *shares of stock*; that those words were used for the sole purpose of expressing the legislative intent to exempt the *shares of stock* from further taxation, and *not* with a view of granting any exemption to the *capital stock* of the corporation.

In the alternative, the *shares of stock* are alleged to be liable to taxation if *capital stock* should be held to be exempt under the charter.

The bill concedes the exemption of the one or the other, but denies that both are exempt.

Demurrants assert that, by a proper construction of the charter, both *shares of stock* and *capital stock* are exempt absolutely from all taxation, except the one-half of one per cent. expressly prescribed.

The charter was granted under the Constitution of 1834, when it was within the power of the Legislature to grant such exemption as it deemed best (Const. 1834, Art. XI., Sec. 7); hence, the exact measure of immunity conferred in this instance, and that to which defendants are entitled, is to be ascertained from the language employed. All that was given must be held to be lawful.

The charter is a contract, by which the State is bound, and whose obligation may not be impaired by subsequent legislation. Const. United States, Art. I., Sec. 10; *Dartmouth College v. Woodward*, 4 Wheaton, 519; 95 U. S., 684; 8 Bax., 541; Tennessee Const., Art. I., Sec. 20; 13 Lea, 408; 2 Pickle, 614; 9 Yer., 490.

*Shares of stock* and *capital stock* are separate and distinct property interests, and form separate and distinct subjects of taxation. The assessment or exemption of the one is not an assessment or exemption of the other. Assessment of both is not double taxation. *New Orleans v. Houston*,

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119 U. S., 277; 117 U. S., 135; 95 U. S., 687; Cooley on Taxation, 231; *Union Bank v. The State*, 9 Yer., 490; *Street Railroad Co. v. Morrow*, 3 Pickle, 406; *City of Memphis v. Ensley*, 6 Bax., 553; *Nashville Gas-light Co. v. City of Nashville*, 8 Lea, 406.

The right of taxation is inherent in the State. It is a prerogative essential to the perpetuity of the government; and he who claims an exemption from the common burden, must justify his claim by the clearest grant of organic or statute law.

In *Ohio Ins. Co. v. Debolt*, 16 Howard, 435, it is said by Chief Justice Taney, that the right of taxation will not be held to have been surrendered, "unless the intention to surrender is manifested by words too plain to be mistaken."

Brief extracts from other cases illustrate the importance and strictness of the rule:

"If a doubt arise as to the intent of the Legislature, that doubt must be solved in favor of the State." *The Delaware Railroad Tax*, 18 Wallace, 226.

"The Court has, however, in the most emphatic terms, and on every occasion, declared that the language in which the surrender is made must be clear and unmistakable." *Erie Railway Co. v. Penn.*, 21 Wallace, 498, 499.

"When exemption is claimed, it must be shown indubitably to exist." 95 U. S., 686.

The presumption is always "against any surrender of the taxing power." 117 U. S., 136.

See, to same effect, 9 Bax., 551; *M. & C. R.*

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*R. Co. v. Gains*, MS., Nashville, March, 1878; 13 Lea, 406; 109 U. S., 398; 143 U. S., 195.

In view of the foregoing rule, we would have no hesitation, if the question were *res integra*, in holding that the provision of this charter *does not* exempt *capital stock* AND also *shares of stock* from other taxation than that named; for, to our minds, the words of the grant do not indubitably manifest an intention to exempt both from further taxation.

Proceeding upon the idea that those words related to capital stock, and exempted it from all assessments, except the charter tax, this Court, in 1873, held that so much of a lot and building—purchased with its capital stock—as was necessarily used by the bank “for the convenient carrying on of its business,” was exempt from further taxation, and that other portions of the lot and building, not so used, were subject to be assessed as other property. *DeSoto Bank v. Memphis*, 6 Bax., 415.

In another case the same charter provision was invoked by the stockholders, who asserted that it protected them against an *ad valorem* tax which had been laid on their shares of stock. The Chancellor held that the stockholders were so protected; but, on appeal, his decree was reversed, this Court holding that the charter tax and exemption related alone to the capital stock, and left shares of stock subject to taxation against the stockholders. *City of Memphis v. Farrington*, 8 Bax., 539.

The stockholders took the case into the Su-

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preme Court of the United States, and there obtained a reversal of the decree of this Court and an affirmance of the decree of the Chancellor. *Farrington v. Tennessee*, 95 U. S., 679.

In the argument at the bar in the present case, counsel on both sides place great reliance on the opinion delivered in that case by the Supreme Court of the United States. On the one hand, it is contended that its language sustains the primary claim of the bill in this case, by limiting the charter tax and exemption to shares of stock alone; and, on the other hand, it is insisted that it justifies the demurrer, by holding both shares of stock and capital stock exempt from other taxation than that prescribed by the charter.

It is sufficient for us to say, at this point, that the only question for decision in that case was the effect of the particular words of the charter upon the rights of the stockholders. Shares of stock alone had been taxed, and stockholders alone were making the contest. The corporation was not before the Court.

Mr. Justice Matthews, while on the circuit, in referring to that case, said: "It was held that the words, 'in lieu of all other taxes,' as thus used, meant in lieu of all other taxes that might be imposed on that subject of taxation—viz., the shares of the capital stock—and that, accordingly, it excluded a tax on those shares assessed upon them against the individual share-holder as his property." *State of Tennessee v. Whitworth*, 22 Fed. Rep., 80.

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When the latter case reached the Supreme Court of the United States, Chief Justice Waite, in delivering the opinion, said of the Farrington case that the question therein raised was whether the provision of the charter "exempted the shares in the hands of the stockholders from any further taxation by the State," and that "the Court, three Justices dissenting, held that it did, because, as the charter tax was laid on each share subscribed, the further exemption must necessarily have been of the shares in the hands of the holders, although the tax as imposed was payable by the corporation." *Tennessee v. Whitworth*, 117 U. S., 136.

Since the decision of the Farrington case by the Supreme Court of the United States, this Court has uniformly adhered to its previous holding, that no *ad valorem* tax can lawfully be laid on the *capital stock*, and, in recognition of that decision, has gone further, and SAID that *shares of stock* are likewise exempt from other taxation than that prescribed in the charter. *Bank of Commerce v. McGowan*, 6 Lea, 705; *The State v. Butler*, 13 Lea, 406; *The State v. Butler*, 2 Pickle, 633.

After citing, with approbation, the case of *De-Soto Bank v. City of Memphis*, 6 Bax., 415, and acknowledging the controlling authority of *Farrington v. Tennessee*, 95 U. S., 676, this Court, in its first reference to the latter case, said: "The provision in question will, therefore, protect the capital stock and the shares of the stockholders

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from any taxation beyond that prescribed in the charter." *Bank of Commerce v. McGowan*, 6 Lea, 705.

In the last named case the Bank of Commerce, whose charter was like that now under consideration, owned a building with three stories, but used only one story in its banking business. It also owned three other parcels of real estate, purchased in satisfaction of debts due to the bank. The building and other three pieces of property were assessed for taxes. The bank paid the assessments under protest, and filed its bill to recover the money. The case came to this Court on demurrer; and it was here held that so much of the building as was used by complainant for banking purposes was exempt from taxation, but that the residue of the building and the other three lots were subject to assessment like other property of the same kind. The bank, by writ of error, transferred the case to the Supreme Court of the United States, and there claimed, as it had done in the State Courts, that the entire property was exempt from taxation under its charter. The decree of this Court was affirmed. *Bank v. Tennessee*, 104 U. S., 493.

It is technically true, as contended for by complainant, that the writ of error in the last case took up only so much of the controversy as this Court had decided against the bank, and that therefore the Supreme Court of the United States cannot properly be said to have *decided* that even

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a part of the bank's building was exempt under its charter. Nevertheless, the reasoning of the Court shows that such was its opinion. Indeed, that decision, as well as the decision of this Court, was based upon the idea (1) that the capital stock of the bank was exempt from all taxation except that prescribed in the charter; and (2) that, such being the case, a building in which part of its capital has been invested must be exempt so far as used by the bank for its legitimate corporate purposes, but no further.

Considering the decisions of the Supreme Court of the United States in *Farrington v. Tennessee*, 95 U. S., 679, and in *Bank v. Tennessee*, 104 U. S., 493, together, and giving them the controlling weight to which they are entitled, it cannot be held otherwise than that the charter tax of one-half of one per cent. is in lieu of all other taxes, whether against the bank on its *capital stock* or against owners on *shares of stock*. Under the construction there given, the charter exemption includes both.

As an original question, we would hold as held by this Court in *Memphis v. Farrington*, 8 Bax., 539, and charge the stockholders with an *ad valorem* tax; but, upon authority, we hold as stated above.

This Court has never *decided*, and, in the absence of the ruling of the Supreme Court of the United States in *Farrington v. Tennessee*, 95 U. S., 679, would not now decide that the charter gives the owners of *shares of stock* any immunity or



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exemption from taxation *on the shares*. That question is now adjudged alone upon the authority of that case. It did not arise, and was not adjudged, in *Bank of Commerce v. McGowan*, 6 Lea, 705; in *The State v. Butler*, 13 Lea, 406; or in *The State v. Butler*, 2 Pickle, 633.

Complainant seeks, in addition to what has already been stated, to recover from the bank \$1,800, as privilege taxes for the years 1889, 1890, and 1891. These taxes are claimed from the corporation for the right of exercising its franchises—for the privilege of doing a banking business. Manifestly, the charter tax was intended to cover this right or privilege. The language of the charter implies that, in consideration of the public good and the payment of the tax therein specified, the State will allow the corporation to exercise the franchises granted without further taxation. *City of Memphis v. Hernando Ins. Co.*, 6 Bax., 527; *Union Bank v. State*, 9 Yer., 490.

The case of *New Orleans City, etc., v. New Orleans*, 143 U. S., 192, is not, as we understand it, an authority against this ruling. There the contract afforded “no evidence of an intention” to exempt the corporation from license or privilege tax (*Ib.*, 195); here the intention to do so is clear and unmistakable. The charter tax was imposed primarily as a consideration for the corporate franchises and the right to exercise them. No other reasonable construction can be placed upon the words of the charter.

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The State is bound by its contract; and so, likewise, is the city of Memphis, which is but an arm or agency of the State government. This is true not only as to privilege taxes, but also with respect to the other taxes claimed in this case. All subjects of taxation covered by the charter tax are exempt from further assessment, whether made in behalf of the State, county, or municipality.

As to those subjects, the specified tax is in lieu of all other taxes—State, county, and municipal. Such is the undoubted meaning of the contract. *City of Memphis v. Hernando Ins. Co.*, 6 Bax., 527; *Union Bank v. The State*, 9 Yer., 490; *Nashville v. Thomas*, 5 Cold., 600.

The decision of this case controls the other cases by the same complainant against the Hernando Insurance Company *et al.*, and against the Bluff City Insurance Company *et al.*, respectively, the bills in those cases having been filed for the same purposes and on the same behalf as the bill in this case, and the immunity clause of the charters of those companies, upon which defense is made, being in precisely the same words as that herein considered.

Enter decrees dismissing each of the three bills. Confine the adjudication to points herein discussed, other questions not having been considered.

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Memphis v. Home Insurance Co.

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## MEMPHIS v. HOME INSURANCE CO.

(Jackson. July 7, 1892.)

1. TAXATION. *Of corporations. Charter provision construed.*

Capital stock, not shares of stock, is taxed under clause in charter of corporation providing that "there shall be a State tax of one-half of one per cent. upon the amount of capital paid in."

Act construed: Acts 1853-54, Ch. —.

2. SAME. *Same. Exemption by implication.*

And, under said charter provision, the thing taxed—to wit: the capital stock—is exempted by implication from all taxation, whether State, county, or municipal, other than the charter tax. This exemption does not extend to the shares of stock.

Cases cited and approved: *Union Bank v. State*, 9 Yer., 490; 95 U. S., 679.

Cited and distinguished: 117 U. S., 136.

3. SAME. *Same. Collection of tax assessed against unknown owners of shares of stock.*

Where shares of stock have been assessed to "unknown owners" on account of the default of the corporate officers in furnishing to the assessor the names of share-holders, the tax thus assessed may be collected either by direct suit against the corporation, especially if it be a dividend-paying concern, or by suit against the corporation and its officers, seeking discovery of the names of its share-holders, in order that they may be made parties by supplemental bill.

Acts construed: Acts 1887, Ch. 2, Sec. 10; Acts 1889, Ch. 96, Secs. 10, 12; Acts 1891, Ch. 26, Secs. 5, 7 (Ex. Sess.).

4. SAME. *Same. General rules re-affirmed.*

Doctrine re-affirmed that a charter contract for exemption from taxation (created prior to Constitution of 1870) cannot be impaired by the State, or by counties or municipalities.

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Cases cited and approved: Union Bank v. State, 9 Ver., 490; Memphis v. Union and Planters' Bank, *ante*, p. 546; Memphis v. Insurance Co., 6 Bax., 527; Nashville v. Thomas, 5 Cold., 600.

5. SAME. *Same. Same.*

Doctrine re-affirmed that charter exemptions from taxation cannot exist unless expressed in language too plain to be mistaken, and are left free from any reasonable doubt.

Cases cited and approved: Memphis v. Bank, *ante*, p. 546; Wilson v. Gaines, 9 Bax., 551; State v. Butler, 13 Lea, 406; 16 How., 435; 18 Wall., 226; 21 *Id.*, 498; 95 U. S., 686; 117 U. S., 136, 148; 109 U. S., 398; 143 U. S., 195.

6. SAME. *Same. Same.*

Doctrine re-affirmed that the capital stock of a corporation and its shares of stock are distinct subjects of taxation, the one not being affected by the taxation or exemption of the other.

Cases cited and approved: Memphis v. Bank, *ante*, p. 546; Union Bank v. State, 9 Ver., 490; St. R'y Co. v. Morrow, 87 Tenn., 406; Memphis v. Ensley, 6 Bax., 553; Gas-light Co. v. Nashville, 8 Lea, 406; 95 U. S., 687; 117 U. S., 135; 119 U. S., 277.

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FROM SHELBY.

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Appeal from Chancery Court of Shelby County.  
J. S. GALLOWAY, Probate Judge, sitting by interchange.

F. T. EDMONDSON and METCALF & WALKER for  
Memphis.

F. P. POSTON and MORGAN & MCFARLAND for  
Insurance Company.

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Memphis v. Home Insurance Co.

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CALDWELL, J. The State filed this bill, on behalf of the city of Memphis, to recover from the Home Insurance Company and from the owners of its shares of stock certain *ad valorem* taxes alleged to be due on capital stock and shares of stock respectively.

Defendants, by demurrer, claimed exemption by virtue of the charter of incorporation, which was set out in the bill. The demurrer was sustained and the bill dismissed. Complainant has appealed.

The Home Insurance company was chartered March 2, 1854. By the thirtieth section of the charter it was provided that "there shall be a State tax of one-half of one per cent. upon the amount of capital actually paid in."

Manifestly, this charter tax was laid upon the capital stock, and was by the Legislature intended to operate as an exemption to the corporation from further taxation on that stock. Though not expressed in so many words, the exemption results by necessary implication from the language employed.

The prescribed tax is the full pecuniary consideration to be paid by the corporation for the franchises granted by the State. Among those franchises is that of owning and using the capital stock for the purposes contemplated in the charter. To exact an additional tax upon the company's capital stock is to exact an additional consideration for the thing or one of the things granted in the first instance. That cannot lawfully be

done. The charter is a contract whose obligation the State cannot impair by tax-laws or otherwise. *Union Bank v. The State*, 9 Yer., 490; *Memphis v. Union and Planters' Bank*, ante, p. 546.

This contract binds not only the State, but also the counties and municipalities, which are but agencies of the State government.

The State may not lay an additional tax upon the *capital stock* of the defendant company, nor may the city of Memphis, for whose use this suit is brought. *Ib.*; *City of Memphis v. Hernando Ins. Co.*, 6 Bax., 527; *Nashville v. Thomas*, 5 Cold., 600.

This decides but half the case, however; and it remains to inquire whether the charter exemption extends to *shares of stock*. *Capital stock* and *shares of stock* are different things, and form different subjects of taxation. A tax upon the one is not a tax upon the other, nor is an exemption of the one an exemption of the other. Before the law each must stand upon its own bottom. *Memphis v. Union and Planters' Bank*, ante, citing 119 U. S., 277; 117 U. S., 135; 95 U. S., 687; *Cooley on Taxation*, 231; 9 Yer., 490; 3 Pickle, 406; 6 Bax., 553; 8 Lea, 406.

In the case at bar, it has been seen that the charter tax is laid upon the *capital stock*, and that, by implication, that subject of taxation is to be exempted from further assessment.

That tax is laid upon the one subject of taxation only, and the implication of exemption arising therefrom can, by no fair construction, be held to

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have greater scope. The implied exemption cannot be broader than the express tax. Only the subject or subjects covered by the tax are included in the exemption.

As this Court said in a recent case: "The right of taxation is inherent in the State. It is a prerogative essential to the perpetuity of the government; and he who claims an exemption from the common burden, must justify his claim by the clearest grant of organic or statute law." *Memphis v. Union and Planters' Bank*, ante, p. 546.

Every presumption is against any surrender of the taxing power; and if, in a given case, a doubt arise as to the intent of the Legislature on this subject, that doubt must be solved in favor of the State. Unless the intention to surrender is manifested by words too plain to be mistaken, the right to tax must be held still to reside in the State. 16 Howard, 435; 18 Wallace, 226; 21 Wallace, 498; 95 U. S., 686; 117 U. S., 136; *Ib.*, 148; 109 U. S., 398; 143 U. S., 195; 9 Bax., 551; 13 Lea, 406.

When this rule is applied to the case at bar, it becomes perfectly clear that *shares of stock* in the Home Insurance Company are subject to *ad valorem* taxation, in such manner as the State may, by proper statute, prescribe. The claim of exemption is not justified by a grant in the clearest terms. Indeed, it is supported by no grant at all. The only exemption given by the charter arises by

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implication from the thirtieth section, quoted on the first page of this opinion. That provision has no reference to *shares of stock*; it does not mention them either for the purpose of taxation or for the purpose of exemption. No tax is laid on them, and no exemption can be implied in their favor. Being beyond the scope of the tax prescribed by the charter, they are likewise beyond the immunity afforded thereby.

The words of the charter in this case are the same, in legal import, as those of the charter construed in the case of the *Union Bank v. The State*, 9 Yer., 490. There they were held to exempt the capital stock from other than the charter tax, and to leave the shares of stock open to taxation as other non-exempt property. The ruling here made is in accord upon both questions. That case met the approval and commendation of the Supreme Court of the United States in *Farrington v. Tennessee*, 95 U. S., 679, and, on the two points mentioned, has never been questioned by this Court.

The decision in *Tennessee v. Whitworth*, 117 U. S., 136, is not in conflict. The distinction between capital stock and shares of stock, and the liability of both, at the same time, to taxation by the State, were expressly recognized in that case; and the shares of stock there in contest were adjudged not taxable, upon the ground alone that the words of the particular charter were found to manifest an unmistakable intent on the part of the Legislature to exempt them. No such intent ap-



pears, or can reasonably be claimed, in the present case.

The shares of stock were assessed to "unknown owners." That fact is explained by the allegation that the officers of the corporation refused, upon proper application, to furnish a list of the stockholders to the assessor; and the secretary of the company, who is alleged to be the custodian of its books, is brought before the Court, that a discovery may be had and the stockholders thereafter made parties by supplemental pleading. Though the statute does not require that the officers of a stock company shall *furnish* a list of stockholders in the sense of making it out and sending it to the tax-assessor, it does make it the duty of the officers of the corporation to keep such a list always on hand, and subject to the free inspection of the assessor. Acts 1887, Ch. 2, Sec. 10; Acts 1889, Ch. 96, Sec. 10; Acts Extra Session 1891, Ch. 26, Sec. 5.

The allegation is, in effect, that the defendant company failed to perform that duty, and thereby withheld the information necessary to an assessment of the shares to the owners by name.

Discovery is a proper remedy in such a case; yet the complainant might as appropriately and more speedily collect its revenues by proceeding directly against the corporation for a sufficiency of the dividends which the law (Acts 1887, Ch. 2, Sec. 10, and Acts 1889, Ch. 96, Sec. 12; Acts Extra Session 1891, Ch. 26, Sec. 7) requires it to

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retain for the payment of taxes on the shares. Especially would such a practice be more speedy than the remedy by discovery, if the corporation be a dividend-paying concern.

Reverse and remand.

91	566
117	765

## MEMPHIS v. PHOENIX, ETC., INSURANCE CO.

(Jackson. July 7, 1892.)

1. TAXATION. *Charter exemption exists, when.*

A corporation that is clothed by the terms of its charter "with all the powers, privileges, and IMMUNITIES" of an older existing corporation, is invested with a valid exemption from taxation contained in the charter of the older corporation.

Act construed: Acts 1858, Ch. 166, Sec. 12.

2. SAME. *Charter exemption does not exist, when.*

But a corporation clothed by the terms of its charter "with all the rights and privileges" of an older existing corporation, without more, is not invested with an exemption from taxation contained in the charter of the older corporation.

Act construed: Acts 1866-67, Ch. 71, Sec. 1.

Cases cited and approved: *Wilson v. Gaines*, 9 Bax., 546; *Railroad v. Hamblen County*, MS., Knoxville, September term, 1877; *Railroad v. Gaines*, MS., March, 1878; 97 U. S., 697; 102 U. S., 273; 103 U. S., 417; 93 U. S., 217; 130 U. S., 642.

Cited and distinguished: *Railroad v. Hicks*, 9 Bax., 442; *State v. Railroad*, 12 Lea, 538; 117 U. S., 146.

3. SAME. *Method of collection of taxes assessed upon shares of stock of corporation.*

Collection of taxes assessed against the shares of stock of a corporation, where the share-holders are unknown, may be enforced by direct suit against the corporation for the tax, if it be a dividend-paying concern, or by bill against the corporation and its officers for discovery

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of the names of the share-holders, in order that they may be brought before the Court by supplemental bill for recovery of tax of them.

Case cited and approved: Memphis v. Home Ins. Co., *ante*, p. 558.

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FROM SHELBY.

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Appeal from Chancery Court of Shelby County.  
J. S. GALLOWAY, Probate Judge, sitting by interchange.

METCALF & WALKER and F. T. EDMONDSON for  
Memphis.

U. W. MILLER for Insurance Company.

CALDWELL, J. On March 11, 1867, the Washington Fire and Marine Insurance Company, of Memphis, Tennessee, was chartered by the State, "with all the *rights and privileges* of the DeSoto Insurance and Trust Company." Acts 1866-67, Ch. 71, Sec. 1. The latter company had previously been chartered "with all the *powers, privileges, AND IMMUNITIES*" of the Bluff City Insurance Company. Acts 1858, Ch. 166, Sec. 12. By the tenth section of the charter of the Bluff City Insurance Company it was provided, "that said company shall pay to the State an annual tax of one-half of one per cent. on each share of the

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capital stock subscribed, which shall be in lieu of all other taxes." Acts 1858, Ch. 166, Sec. 10.

On March 28, 1881, the name of the Washington Fire and Marine Insurance Company was, by legislative enactment, changed to the "Phoenix Fire and Marine Insurance Company, of Memphis, Tennessee." Acts 1881, Ch. 28, Sec. 1.

This bill was filed by the State, on behalf of the city of Memphis, against the last-named company and its secretary, to recover certain *ad valorem* taxes alleged to be due on capital stock, or, in the alternative, on shares of stock.

Defendants, by demurrer, claimed immunity from all assessments, except one-half of one per cent. on each share of capital stock subscribed, which the bill concedes has been paid to the State.

The Chancellor sustained the demurrer and dismissed the bill. Complainant appealed.

The controlling question for our decision is this: Did the Washington Fire and Marine Insurance Company—in whose shoes the Phoenix Fire and Marine Insurance Company now rightfully stands—acquire, by its charter from the State, the same immunity granted to the Bluff City Insurance Company by the tenth section of its charter, hereinbefore set out?

If it did, the decree of dismissal must be affirmed, for reasons stated in the recent case of *Memphis v. Union and Planters' Bank*, ante, p. 546; if not, then the decree must be reversed and the bill entertained.

Confessedly, the DeSoto Insurance and Trust Company was granted that immunity, for, by the express words of its charter, it was given "all the powers, privileges, and immunities" of the Bluff City Insurance Company. But the Washington Fire and Marine Insurance Company (which now exists by legislative sanction under the name of Phoenix Fire and Marine Insurance Company) received by its charter only "the rights and privileges" of the DeSoto Insurance and Trust Company.

Did the last-named words, "rights and privileges," carry the tenth section of the Bluff City Insurance Company's charter into the charter of the Washington Fire and Marine Insurance Company, and thereby give it immunity from all taxation, except that therein prescribed? Clearly it did not. Such, in our opinion, was not the legislative intent. In the absence of an intent to that effect, unmistakably manifested by the terms of the grant, the immunity must be held not to have been conferred. No presumption is to be indulged in its favor.

The Constitution of 1834, under which all of the foregoing charters were granted, used in the same connection, one after the other, in the same clause, all the words, "rights," "privileges," "immunities," and "exemptions," as follows:

"The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of

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individuals, inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law; *Provided always*, The Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good." Constitution of 1834, Art. XI., Sec. 7.

Properly, the language of these charters should be interpreted in the light of that provision of the organic law in which each word has its own office to fill, and no one that of another.

When the Legislature said the DeSoto Insurance and Trust Company should enjoy "all the powers, privileges, and immunities" of the Bluff City Insurance Company, more was meant than when it afterwards said that the Washington Fire and Marine Insurance Company should have "all the rights and privileges" of the DeSoto Insurance and Trust Company. The words used in the former case, of necessity, have greater scope and fullness of meaning than those used in the latter case. It cannot, with any satisfactory process of reasoning or definition, be contended that the measure of the State's grant was the same in each instance. There is a marked difference, and that difference lies, mainly, in the word immunities, whose use in the one case, admittedly, includes the limited tax prescribed

in the charter of the Bluff City Insurance Company, and whose omission in the other case as naturally excludes it.

The words "rights and privileges," as employed in the charter before us, do not embrace immunity from taxation in any degree.

The cases of *Railroad Co. v. Hicks*, 9 Bax., 442, and *The State v. N., C. & St. L. Ry.*, 12 Lea, 538, are not necessarily in conflict with this ruling, for, in each of those cases, the purchaser was held to have the immunity of the original corporation, upon the ground that the statute authorizing the sale, and the decree directing it, provided that "all the rights, privileges, and immunities" of such corporation should be transferred to, and vested in, the purchaser.

The other cases of the *E. T., Va. & Ga. R. R. Co. v. Hamblen County*, MS., Knoxville, September, 1877, and *Wilson v. Gaines*, 9 Bax., 546, are in accord with the ruling made herein. Each of these latter cases went into the Supreme Court of the United States on writ of error, and the judgments of this Court were there affirmed. *Railroad Co. v. Hamblen County*, 102 U. S., 273; *Wilson v. Gaines*, 103 U. S., 417.

In still other cases has this Court held that the words "rights and privileges," do not embrace immunity from taxation. *Memphis and Charleston R. R. Co. et al. v. James L. Gaines, Comptroller, et al.*, MS., March, 1878, and citations therein.

The last named case was also affirmed in the



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Supreme Court of the United States. *Railroad Companies v. Gaines*, 97 U. S., 697.

The opinion of Mr. Justice Field, in *Morgan v. Louisiana*, 98 U. S., 217, was aptly cited as authority for the main proposition in *Wilson v. Gaines*, 9 Bax., 552, and also in *Memphis and Charleston R. R. Co. et al. v. James L. Gaines, Comptroller, et al.*, MS.

A different ruling seems to have been made in *Tennessee v. Whitworth*, 117 U. S., 146, wherein the reasoning adopted by this Court in *Wilson v. Gaines*, 9 Bax., 546, was disapproved. But as late as 1889, the question here under consideration came again before the Supreme Court of the United States, in a case originating in this State, and involving the construction of a Tennessee charter, and in that case, Mr. Justice Field, speaking for a unanimous Court, among other things, said: "It is true, there are some cases where the term 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the Act have given such meaning to it. The later, and, we think, the better opinion is, that unless other provisions remove all doubt of the intention of the Legislature to include the immunity in the term 'privileges,' it will not be so construed. It can have its full force by confining it to other grants to the corporation." *Pickard v. E. T., Va. & Ga. R. R. Co.*, 130 U. S., 642, citing and approving, on this proposition, *Railroad Co. v. Hamblen County*, 102

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U. S., 273, and *Morgan v. Louisiana*, 93 U. S., 217, 223.

Without referring to other authorities, we hold, upon what seems to us the clear weight of reason and judicial decision, that the Washington Fire and Marine Insurance Company did not, by its charter, acquire any of the *immunities* of the De-Soto Insurance and Trust Company, and that its successor, the Phoenix Fire and Marine Insurance Company, and the owners of its shares of stock, are subject to taxation in the same manner as other like corporations and stockholders having no exemption.

The facts stated in the bill do not make a case of *res adjudicata*.

Complainant, upon the allegation of the bill, is entitled to a discovery of the names and residences of the stockholders, or, by proper amendment, to proceed against the corporation directly, for the purpose of appropriating dividends to payment of all proper assessments against shares of stock. *State of Tennessee, for the use, etc., v. Home Insurance Co. et al., ante*, p. 558.

Reverse and remand.

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## MEMPHIS v. MEMPHIS CITY BANK.

(Jackson. July 7, 1892.)

1. TAXATION. *Legislative power to exempt from taxation wanting under Constitution of 1870.*

The Legislature has not power, under the Constitution of 1870, to pass any law, general or special, original or amendatory, to confer upon corporations or individuals, or classes thereof, any exemptions from taxation, other than such as are expressly permitted by said Constitution, either by creating a new and original exemption for their benefit, or by extending and preserving the life of an existing lawful exemption under conditions and for purposes not contemplated in its creation. This result is reached by construction of the clauses of the Constitution of 1870 relating to taxation and to the creation of corporations. The rule was otherwise under the Constitution of 1834, its corresponding clauses being materially different. (*Post*, pp. 583-589.)

Constitution construed: Art. II., Sec. 28, Art. XI., Sec. 7 (1834); Art. II., Sec. 28, Art. XI., Sec. 8 (1870).

Cases cited and approved: *Railroad v. Wilson County*, 89 Tenn., 608; *Ellis v. Railroad*, 8 Bax., 530; *Chattanooga v. Railroad*, 7 Lea, 576; *Railroad v. State*, 8 Heis., 789; *Franklin County v. Railroad*, 12 Lea, 547; *Railroad v. Gaines*, 3 Tenn. Ch., 611; 141 La. Ann., 188.

Cases cited and distinguished: *State v. Butler*, 13 Lea, 406; *State v. Butler*, 86 Tenn., 620; 97 U. S., 147.

2. SAME. *Same.*

The conceded authority of the Legislature, under the Constitution of 1870, to increase the "powers" of existing corporations by general laws, does not include authority to confer upon such corporations an immunity from taxation. "Powers" does not include immunity from taxation. (*Post*, pp. 589, 590.)

Constitution construed: Art. XI., Sec. 8.

Cases cited and approved: *Memphis v. Insurance Co.*, *ante*, p. 566; *Wilson v. Gaines*, 9 Bax., 546; *Railroad v. Hamblen County*, MS.,

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Knoxville, 1877; Railroad v. Gaines, MS., Nashville, 1878; 102 U. S., 273; 103 U. S., 417; 97 U. S., 697; 93 U. S., 217; 130 U. S., 642.

3. SAME. *Construction of charter provision exempting from taxation.*

The shares of stock in a corporation are not liable for the tax imposed, nor protected by the immunity from taxation granted, by a clause in its charter providing "that there shall be levied a State tax of one-half of one per cent. upon the amount of capital stock actually paid in, to be collected in the same way and at the same time as other taxes are by law collected, which shall be in lieu of all other taxes." (*Post*, pp. 577-579.)

4. SAME. *Same.*

But the capital stock of the corporation alone is subject to the tax imposed and protected by the exemption granted by said provision. And the effect of said provision, if valid, is to protect the capital stock from all taxes, except that imposed by the charter, whether State, county, or municipal. (*Post*, pp. 577-579.)

Cases cited and approved: Union Bank v. State, 9 Yer., 490; Memphis v. Insurance Co., *ante*, p. 558.

5. SAME. *Exemption from taxation not transmissible.*

An insurance company was chartered prior to 1870. It possessed exemption from taxation. After the Constitution of 1870 went into effect, this insurance company was converted into a banking corporation by legislative permission. The legislation effecting this change not only changed the name of the old corporation, and invested it with new powers, but provided that the new corporation should enjoy "any franchise, right, power, privilege, or immunity" possessed by the former corporation.

*Held*: The immunity from taxation did not pass. The power to transfer this immunity is equivalent to the power to create it, and both are prohibited under Constitution of 1870. (*Post*, pp. 580-592.)

Act construed: Acts 1887, Ch. 190.

Cases cited and approved: Bank v. Memphis, 6 Bax., 415; Bank v. McGowan, 6 Lea, 705; 104 U. S., 493.

6. CORPORATIONS. *Construction of charter of insurance company.*

An insurance company, chartered, organized, and operated as such, has not banking powers authorizing it to conduct the business of a bank, although its charter provides "that said corporation shall be capable in law \* \* \* of receiving in trust, from any person, money, jewels, plate, or other valuable thing." (*Post*, pp. 593, 594.)

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7. SAME. *Capital stock and shares of stock are separate properties.*

The capital stock of a corporation and its shares of stock are distinct taxable properties. The taxation or exemption of one is not taxation or exemption of the other. (*Post*, p. 578.)

Cases cited and approved: *Memphis v. Bank*, *ante*, p. 546; *Memphis v. Insurance Co.*, *ante*, p. 558; *Wilson v. Gaines*, 9 Bax., 551; *Gas-light Co. v. Nashville*, 8 Lea, 406; *Union Bank v. State*, 9 Yer., 490; *Street Railroad Co. v. Morrow*, 87 Tenn., 406; 95 U. S., 687; 117 U. S., 135; 119 U. S., 277.

8. CONSTITUTIONAL LAW. *Rule of construction.*

In construction of the Constitution every clause should be given effect.

The language of one clause should not be pressed so far as to annul another clause. (*Post*, p. 586.)

Cases cited and approved: *McKinney v. Hotel Co.*, 12 Heis., 116; *Memphis v. Water Co.*, 5 Heis., 495.

9. SAME. *Charter exemptions are inviolable contracts.*

Charter exemptions from taxation granted prior to 1870 constitute contracts that the State cannot impair by legislation or otherwise. (*Post*, p. 578.)

Cases cited and approved: *Memphis v. Bank*, *ante*, p. 546; *Memphis v. Insurance Co.*, *ante*, p. 558; *Memphis v. Insurance Co.*, 6 Bax., 527; *Nashville v. Thomas*, 5 Cold., 600.

10. SAME. *Same. Construction of charter exemptions.*

Charter exemptions from taxation are never allowed unless expressed in language so plain and unmistakable as to leave no reasonable doubt of the legislative intent to create them. (*Post*, pp. 579, 580.)

Cases cited and approved: *Memphis v. Bank*, *ante*, p. 546; *Memphis v. Insurance Co.*, *ante*, p. 558; *Wilson v. Gaines*, 9 Bax., 551; *State v. Butler*, 13 Lea, 406; 16 How., 435; 18 Wall., 498; 95 U. S., 686; 117 U. S., 136, 148; 109 U. S., 398; 143 U. S., 195.

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FROM SHELBY.

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Appeal from Chancery Court of Shelby County.  
J. S. GALLOWAY, Probate Judge, sitting by inter-  
change.

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Memphis v. Memphis City Bank.

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F. T. EDMONDSON and METCALF & WALKER for  
Memphis.

FRAYSER & SCRUGGS and TAYLOR & CARROLL for  
Bank.

CALDWELL, J. The State brought this bill, on behalf of the city of Memphis, to recover from the Memphis City Bank and from its stockholders, respectively, certain *ad valorem* taxes alleged to be due on capital stock and on shares of stock.

The bill was dismissed on demurrer, and complainant appealed.

The main defense is made upon the seventeenth section of the charter of the Memphis City Fire and General Insurance Company, of which defendants claim the full benefit, and by which they contend that both capital stock and shares of stock are exempt from all taxation, except that prescribed therein.

The language of that provision, so far as material to this contention, is as follows: "*Be it further enacted*, That there shall be levied a State tax of one-half of one per cent. upon the amount of capital stock actually paid in, to be collected in the same way and at the same time as other taxes are by law collected, which shall be in lieu of all other taxes and assessments."

The tax here prescribed is the pecuniary consideration to be paid by the corporation to the State for the franchises granted. It is expressly

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laid upon the *capital stock*, and is intended, obviously, to "be in lieu of all other taxes and assessments" on that subject of taxation. No additional tax can lawfully be laid upon capital stock, whether in favor of State, county, or municipality. The charter is binding not only upon the State, but also upon county and municipality, which are but agencies of the State in administering the affairs of government; it is a contract whose obligation may not be violated by subsequent revenue laws or otherwise. *Union Bank v. The State*, 9 Yer., 490; *Memphis v. Union and Planters' Bank*, ante, p. 546; *Memphis v. Home Insurance Company*, ante, p. 558; *City of Memphis v. Hernando Insurance Company*, 6 Bax., 527; *Nashville v. Thomas*, 5 Cold., 600.

Whether the *shares of stock* are, by this charter, exempt from *ad valorem* taxation is a totally different question; for capital stock and shares of stock are distinct subjects of taxation. The assessment or exemption of the one is not the assessment or exemption of the other. *Memphis v. Union and Planters' Bank*, ante, p. 546; *Memphis v. Home Insurance Company*, ante, p. 558; 9 Yer., 490; 6 Bax., 553; 8 Lea, 406; 3 Pickle, 406; 95 U. S., 687; 117 U. S., 135; 119 U. S., 277; Cooley on Taxation, 231.

The charter tax of "one-half of one per cent. upon the amount of *capital stock* actually paid in" is, therefore, not a tax upon *shares of stock*; nor is the exemption of capital stock from further taxation an exemption of shares of stock.

That the charter tax is laid exclusively upon capital stock is too manifest to admit of debate, and, to our minds, it is equally clear that the words, "which shall be in lieu of all other taxes and assessments," refer alone to the same subject of taxation. But the one subject of taxation is mentioned. Hence, it would be illogical to give the exemption greater scope. The exemption contemplated followed in the legislative mind as a proper result from the tax imposed. The property protected from *further burden* is that upon which the *specific burden* is already imposed. The *shares of stock* are not liable for the charter tax; they are not embraced in the charter exemption; they are subject to taxation as other non-exempt property of the same kind.

If the taxability of shares of stock were left in doubt by the words of the charter, the doubt should be resolved in favor of the State. He who claims exemption from the common burden of taxation, must justify his claim by the clearest grant from the State. Every presumption is against any surrender of the taxing power, and the State must be held to have the power of assessing all property, taxable under the Constitution, unless by authorized grant, in words too plain to be mistaken, an intention to surrender that power is manifested. *Memphis v. Union and Planters' Bank*, ante, p. 546; *Memphis v. Home Insurance Company*, ante, p. 558; 9 Bax., 551; 13 Lea, 406; 16 Howard, 435; 18 Wallace, 498; 95 U. S., 686;



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117 U. S., 136; *Ib.*, 148; 109 U. S., 398; 143 U. S. 195.

The language of the charters considered in *Union Bank v. The State*, 9 Yer., 460, and in *Memphis v. Home Insurance Company*, *ante*, p. 558, is, in legal effect, the same as that here involved, and in each of those cases it was decided that capital stock was exempt from further taxation, but that the shares of stock were subject to assessment as other non-exempt property of the same kind.

The only difference worthy of mention here, lies in the fact that the words, "which shall be in lieu of all other taxes and assessments," appearing in this charter, are not found in the charters construed in those cases, and that difference is unimportant, being one of language merely and not of legal import. In those cases exemption of capital stock from all other taxation arose by necessary *implication* from the fact that the Legislature, in the charter, laid a prescribed tax upon that subject of taxation; while in this case the exemption, there *implied*, is *expressed* by the words, "which shall be in lieu of all other taxes and assessments." There the exemption followed as a legal result; here the same legal result is expressed in so many words, without adding any thing to the legal import of the charter.

Thus far this opinion has proceeded upon the assumption that defendants are entitled to the full benefit of the seventeenth section of the charter of the Memphis City Fire and General Insurance

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Company, as they claim to be. Whether they are in reality so entitled remains to be considered.

That company was chartered January 24, 1870. By the twelfth section of the charter it is provided "that the said corporation shall be capable in law \* \* \* of receiving in trust, from any person, money, jewels, plate, or other valuable thing."

On March 26, 1887, the Legislature passed "An Act to define the powers of corporations," as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, First, that any company incorporated under the laws of this State, having, by its charter, the right to receive moneys in trust or otherwise, shall be held to have, and shall have, the power, after the passage of this Act, to receive deposits, and loan the same and its capital on any kind of commercial or business paper or real estate, buy and sell exchange, and all kinds of public or private securities and commercial paper. Second, that the exercise of any of the foregoing powers by any corporation created or incorporated or chartered under the laws of this State, shall not operate to forfeit or affect any franchise, right, power, privilege, or immunity granted to such corporation in and by its charter." Acts 1887, Ch. 190, Sec. 1.

On January 22, 1889, another Act was passed, by the first section of which the name of the "Memphis City Fire and General Insurance Com-

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pany" was changed to "Memphis City Bank;" and by the second section of which it was enacted "that such change of name, as provided for in the first section of this Act, shall not operate to forfeit, affect, or abridge any franchise, right, power, privilege, or immunity granted to said corporation by its original charter."

Complainant alleges, and defendants by their demurrer admit, that the Memphis City Fire and General Insurance Company was organized under its charter, and was engaged in a general insurance business until the passage of the foregoing Act, by which its name was changed; and that thereafter it abandoned the business of insurance, and employed its capital in a general banking business, in which it is still engaged.

Upon these facts the question arises whether or not the Memphis City Bank is entitled to *any* immunity from taxation by virtue of the seventeenth section of the original charter hereinbefore construed.

In the absence of the Acts of 1887 and 1889, it is clear that no such immunity would exist; for, by the diversion of the capital stock from the business of insurance, and its employment in a banking business, it would cease to be within the protection of the original charter. *DeSoto Bank v. Memphis*, 6 Bax., 415; *Bank of Commerce v. McGowan*, 6 Lea, 705; *Bank v. Tennessee*, 104 U. S., 493.

Then, what is the legal effect of those Acts?

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A mere change of name, without a change of business, would make no difference whatever in the matter of taxation and exemption. 97 U. S., 147; 2 Pickle, 615. A change of business and transfer of corporate rights, privileges, and immunities, by legislative authority, has, several times by this Court, been held to carry with it the same immunity from taxation enjoyed in the original business. *State v. Butler*, 13 Lea, 406; *State v. Butler*, 2 Pickle, 620.

But those decisions were made with respect to changes accomplished under legislation prior to the Constitution of 1870. This leads to a comparative consideration of corresponding provisions of the Constitutions of 1834 and 1870. If such changes might be made, and the immunity preserved to the corporation in its new business under the former Constitution, as has been seen, may the same thing be done under the latter?

In answering this inquiry, it must be kept in mind that the *State* Legislature is omnipotent in matters of legislation, except as to subjects with respect to which its powers are restricted by the organic law.

Section 7, Art. XI., Constitution of 1834, is as follows:

“The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals, inconsistent with the general laws of the land; nor to pass any law granting to any individual

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or individuals rights, privileges, immunities, or exemptions other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law; *Provided always*, The Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good."

It is perfectly clear that, if the negative portion of this section stood alone, the Legislature would have had no power to grant private charters of incorporation, with or without immunities or exemptions. But the inhibition of that portion of the section was so far removed by the proviso as to authorize the grant of such charters as the Legislature might deem expedient for the public good. By virtue of the proviso, it became competent for the Legislature to charter insurance companies, banks, etc., with such rights, privileges, immunities, or exemptions as it might deem expedient for the public good, and as might not be in conflict with other positive provisions of the Constitution; and, having power to grant immunity from taxation to an insurance company or to a bank, one or both, it follows that it had power to authorize incorporators engaged in the one business to abandon it and embark the same capital in the other business with the same immunity. Having power to create both, it was able to transform one into the other.

This interpretation justifies the decisions referred

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to, and, at the same time, makes no conflict with the revenue clause of the same Constitution. That clause is in these words: "All lands liable to taxation, held by deed, grant, or entry, town lots, bank stock, \* \* \* and such other property as the Legislature may from time to time deem expedient, shall be taxable. All property shall be taxed according to its value; that value to be ascertained in such manner as the Legislature shall direct, so that the same shall be equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value." Const. 1834, Art. II., Sec. 28.

In this language can be found no imperative requirement that all property shall be *taxed*. Under it the Legislature might tax or omit to tax. The direction is, that certain property named in the first sentence, and such other property as the Legislature may deem expedient, "*shall be taxable*." The matter of taxation, not only as to the *amount* to be levied, but as to the *property* upon which to be levied, was left largely to the legislative discretion. Therefore, this provision was not violated by grants of immunity from taxation under the other provision. This construction is sustained by the reasoning of the Court in *Railroad Co. v. Hicks*, 9 Bax., 442.

Let us next consider the corresponding provisions of the Constitution of 1870. Section 8 of Art. XI. of that instrument is the same exactly as

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Sec. 7 of Art. XI. of the Constitution of 1834 down to the proviso in the latter, and instead of that proviso, the Constitution of 1870 has the following sentence: "No corporation shall be created, or its powers increased or diminished by special laws, but the General Assembly shall provide by general laws for the organization of all corporations hereafter created, which laws may, at any time, be altered or repealed; and no such alteration or repeal shall interfere with or divest rights which have become vested."

There is some plausibility in the suggestion that this substituted language was intended to authorize the Legislature to do, by general law, what it could do before by special law; but this concession is made only in connection with the qualifying statement that, in both cases, the legislative discretion is subordinate to other positive provisions of the organic law, and that in neither could it be made effective, if exercised in conflict therewith.

Though the Legislature was empowered by the proviso of the seventh section of Art. XI. of the Constitution of 1834, to grant such charters of incorporation, by special laws, as it deemed expedient for the public good, it could not, under that authority, grant corporate "rights expressly forbidden by any other clause" of the same Constitution. *McKinney v. Hotel Co.*, 12 Heis., 116; *Memphis v. Memphis Water Co.*, 5 Heis., 495.

So it is, also, with reference to the Constitution of 1870. The whole instrument must be taken into

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consideration, and no part so construed as to impair or destroy any other part. Legislative powers enumerated in one clause must be defined and exercised with reference to limitations and requirements made in other clauses.

With this fundamental rule of construction in view, and placing Sec. 8 of Art. XI. and Sec. 28 of Art. II., of the Constitution of 1870, in juxtaposition, the conclusion becomes irresistible that the framers of that instrument intended that the Legislature *should not*, thenceforth, have power to grant immunity from taxation, by general law or otherwise, to any new corporation, or to preserve an existing immunity to any old corporation in its change from one business to another fundamentally different. That power was taken away absolutely.

The latter section is as follows: "All property, real, personal, or mixed, *shall be taxed*; but the Legislature may except such as may be held by the State, by counties, cities, or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary, or educational; and shall except one thousand dollars' worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one



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species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value." Const. 1870, Art. II., Sec. 28.

Unlike the revenue clause of the Constitution of 1834, the requirement here is positive and imperative that all property, except that mentioned for exemption, *shall be taxed*. This provision comprehends the whole domain of taxation; and, in explicit terms, prescribes the maximum of exemptions, beyond which the Legislature may not go. It declares what property *may* be and what *shall* be excepted from taxation, and directs that all the rest *shall be taxed*. By that mandatory direction the Legislature is *prohibited* from making any other exemptions from taxation upon any ground or consideration whatever; "and if it attempt to do so, the effort is unavailing and void for want of legislative power." *Railway Co. v. Wilson County*, 5 Pickle, 608; *M. & C. R. R. Co. v. Gaines*, 3 Tenn. Ch., 611; *Ellis v. L. & N. R. R. Co.*, 8 Bax., 530; *Chattanooga v. Railroad Co.*, 7 Lea, 576; 8 Heis., 789 and 796; 12 Lea, 547.

Such an immunity as that claimed by the defendants in this case not being embraced in that exception, and being within the prohibition, the Legislature has no power to grant it, either by original or amendatory enactment, however general in form and operation.

It has already been seen, upon abundant citation of authority, that capital stock and shares of stock

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are *property*. They fall clearly within the constitutional requirement that *all property shall be taxed*. Hence, there is no legislative power to exempt them. As especially in point, we refer to *Bank of Shreveport v. Board of Assessments*, 141 La. Ann., 188.

Under the eighth section of Art. XI. of the present Constitution, the Legislature may, by general laws, provide for the organization of new corporations, and for the increase or diminution of the powers of old ones; but that is the limit. It cannot go further, and grant immunity from taxation, for that is forbidden by Sec. 28, Art. II., of the same instrument.

This construction gives full force to both provisions in letter and in spirit, and makes them perfectly harmonious; while a contrary construction would produce irreconcilable conflict, and, in reality, override and set at naught the latter provision by the former one. Such a result is forbidden by every sound rule of interpretation, and will not be sanctioned for a moment.

Again, it is competent for the Legislature, by general laws, to increase the *powers* of existing corporations, but that does not mean that it may grant immunity from taxation. An *increase of powers* does not include a grant of immunity from taxation. The word "powers" has not so wide a range, it is not so comprehensive in its scope, as the other words of the same section, "rights and privileges;" yet, these latter words do not em-

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brace immunity from taxation. *Memphis v. Phoenix Fire and Marine Insurance Co.*, ante, p. 566; *E. T., Va. & Ga. R. R. Co. v. Hamblen County*, MS., Knoxville, 1877; *M. & C. R. R. Co. v. Gaines*, MS., Nashville, 1878; *Wilson v. Gaines*, 9 Bax., 546; *Railroad Company v. County of Hamblen*, 102 U. S., 273; *Wilson v. Gaines*, 103 U. S., 417; *Railroad Companies v. Gaines*, 97 U. S., 697; *Morgan v. Louisiana*, 93 U. S., 217; *Picard v. E. T., Va. & Ga. R. R. Co.*, 130 U. S., 642.

This, to our minds, is demonstration that the Legislature, since the adoption of the Constitution of 1870, has no power to *grant* or *enlarge* an immunity from taxation to any private corporation, even by general law, whether creative or amendatory. Then, may it *preserve* such an immunity to corporations created before that date, when, by subsequent legislative sanction, they divert their capital into channels not authorized by their original charters? Manifestly not. The lack of power to *preserve* the immunity for the new enterprise follows from the lack of power to *grant* it in the first instance. To *preserve* the immunity of an existing corporation in so radical a change as from an insurance to a banking business, the same measure of legislative power is requisite as in *granting* originally a similar immunity to independent incorporators desiring to enter upon a banking business upon subscriptions of money contributed for that purpose.

The only ground upon which immunity from

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taxation can *now* be preserved to any corporation in this State, is that the charter granting it, when it was lawful so to do, is a contract whose obligation can no more be violated by constitutional amendment than by subsequent legislation.

Aside from the grant of corporate franchise, the legal import of the State's contract in the charter before us was that the *grantee*, the Memphis City Fire and General Insurance Company, should be protected against all taxation, except that expressly named, so long as it should employ its capital and its energies in the business of insurance, but no longer. There was no contract for immunity from taxation in any other business. The charter does not authorize the grantee to abandon the business of insurance and employ its capital in that of banking, as complainant alleges, and defendants by their demurrer admit, has been done. The State made no contract authorizing such a change, unless it did so by the Act of 1887. No authority for it is found in the original charter.

To justify a claim of immunity from taxation as a banking institution, it is indispensable, therefore, that a valid change in the original contract be shown to have been made; and in that change the State must have agreed expressly to two distinct propositions—(1) that the corporation might thereafter do a banking business, and (2) that in the latter business the corporation should have the same immunity enjoyed in the former. *Memphis v. Phoenix Fire and Marine Insurance Company*, ante, p. 566, and authorities cited.

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To the second proposition the State has been powerless to yield assent since May 5, 1870, when the present Constitution was adopted. The Legislature, which alone could act for the State in such a matter, might have agreed, by general law, to the change of business, but it could not preserve the immunity.

It is competent for the Legislature to *increase the powers* of existing corporations by general laws, but it cannot preserve to them immunity from taxation, if, in availing themselves of their new powers, they divert their capital into new enterprises. It can no more preserve the immunity through such a change than it can extend the life of an expiring charter, and thereby preserve the immunity through another term. Either would be tantamount to granting an exemption originally. Hence both are forbidden.

The most that can properly be said in favor of corporations having immunity from taxation, when the Constitution of 1870 was adopted, is, that, so long as they pursue the business then authorized by their charters, they are entitled to the full benefit of that immunity, but if they embark their capital in any business not legitimately within the scope of their charters at that date, whether the diversion be with or without legislative sanction, it thereby becomes, while so employed, subject to taxation as other property of the same species.

Additionally, it is insisted for complainant that the Act of 1887 (Ch. 190), relied on by defendants,

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can avail them nothing; that the whole Act is void, because the subject of the bill was not expressed in the title, as required by Sec. 17, Art. II., of the Constitution.

We express no opinion on this question, as its decision is not necessary in this case.

It is contended for defendants that they are entitled to the immunity here claimed without reference to the Act of 1887. The proposition is that the Memphis City Fire and General Insurance Company was, by the twelfth section of its original charter, given the right and power to do a general banking business, and that no grant of additional powers was necessary to authorize the corporation to do such a business. That section, in full, is as follows:

*“Be it further enacted, That the said corporation shall be capable in law of purchasing, holding, and conveying any and all kinds of estate, real, personal, or mixed; and of receiving in trust from any person, money, jewels, plate, or other valuable thing, and of giving their acknowledgment therefor in such form as the directory of said corporation may deem best suited to the protection and convenience of the depositor and the company; and the said corporation shall hereby be authorized to loan their surplus funds on any public stocks of any incorporated company, or of the United States, or either of them, or to invest them in any real or personal estate or choses in action or other good securities.”*

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Obviously, this language was not used with a view of authorizing the grantee to enter upon a general banking business. The only power named which is not strictly within the scope of a successful insurance business, is that of receiving money and other valuable things in trust; and that power, as expressed, might as well have been conferred upon an insurance company as upon a bank. Certain it is that no authority is given to lend the money deposited, or to employ the capital stock of the corporation in a banking business. This authority is attempted to be conferred by the Act of 1887 alone; yet a general banking institution without such powers is an unheard-of thing.

That only an insurance business was contemplated by the original charter is shown conclusively by the corporate name and the language of the fifteenth section of the charter. That section is as follows:

*“Be it further enacted, That the president, or in his absence the vice-president, with the cashier, shall have full power and authority to make any assurance upon any fire, marine, or river risks, or risks upon any freights, moneys, goods, wares, merchandise, or other valuable thing, or upon livestock, life, or health, and to fix the premiums therefor, and generally to do all things necessary and proper in carrying on the general insurance business; and all policies by them issued, when signed by the president or vice-president, as the case may be,*

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and countersigned by the cashier, with the seal of the company attached, shall be binding upon the corporation to the same extent a like contract can bind a natural person."

Reverse and remand.



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Nelson v. Haywood County.

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## NELSON v. HAYWOOD COUNTY.

(Jackson. July 7, 1892.)

1. CONSTITUTIONAL LAW. *Passage of statutes. Presumption of regularity.*

The Courts indulge every fair and reasonable presumption in favor of the regular and valid passage of statutes. This rule finds application in the construction of journal entries, and in aiding their defects or supplying their omission. This rule is subject to the limitation that no presumption will be indulged which necessarily contradicts the affirmative showing of the journals. (*Post*, pp. 603, 604.)

Cases cited and approved: *Brewer v. Huntingdon*, 86 Tenn., 732; *State v. Algood*, 87 Tenn., 163; *Williams v. State*, 6 Lea, 549; *State v. McConnell*, 3 Lea, 332.

2. SAME. *Same. Description of Act in journal entries.*

It is not essential to the validity of a statute that it should be described in the journal entries recording its passage by setting out its title *in ipsissimis verbis*. Discrepancies between such journal entries and the title of Act are treated as mere abbreviations or omissions, which are supplied by presumption or disregarded as immaterial. (*Post*, pp. 604-606.)

Constitution construed: Art. II., Secs. 17, 18, 21 (1834).

Case cited and approved: 143 U. S., 649.

3. SAME. *Same. Same.*

A discrepancy between the Act as passed and the journal entries recording its passage, as to the number of sections contained in the Act, does not affect its validity. This is not a material matter, but, if it were, the Act and not the recital of the journal entries would be conclusively presumed to speak the truth. (*Post*, pp. 606, 607.)

Constitution construed: Art. II., Secs. 17, 18, 21 (1834).

4. SAME. *Same. Construction of report of conference committee.*

A bill having been passed regularly by both houses was referred, upon a difference between the two houses as to certain proposed amend-

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ments, to a joint committee of conference. This committee reported as follows: "Your committee of conference, to whom was referred Senate Bill No. 10, with House amendments, beg leave to report the accompanying bill in lieu of said bill and amendments, in which is embraced substantially all the provisions of both houses. Your committee deem it prudent to propose a bill in lieu, as the original bill has been much disfigured by amendments, interlineations, and erasures. Your committee ask that the bill offered be accepted and passed." This redrafted bill of the committee of conference contained fewer sections and omitted some of the proposed amendments—the committee substituting compromise provisions therefor. The committee's report was concurred in by the houses, and the bill signed. The bill was not passed after its redrafting by the committee.

*Held:* The Act was constitutionally passed, and is a valid law. The committee did not report a new bill. They had authority to make such changes as would reconcile differences between the two houses. It was not necessary that the bill should be passed upon three readings after the committee's report. (*Post*, pp. 602, 603, 607-609, and 611-612.)

5. SAME. *Same. When statute takes effect.*

When a bill is signed by the Speakers of the two houses, it then takes effect by relation as of date of its passage. It is not required that a bill shall be enrolled before its signing, and therefore the recital of the date of its enrollment on the journals affords no evidence that the bill had not been signed at that date. (*Post*, pp. 609-611.)

Constitution construed: Art. II., Secs. 17, 18, 21 (1834).

Case cited and approved: *Dyer v. State*, Meigs, 237.

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 FROM HAYWOOD.
 

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Appeal in error from Circuit Court of Haywood County. W. II. SWIGGART, J.

J. R. FLIPPIN, W. W. RUTLEDGE, and TURLEY & WRIGHT for Nelson.

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J. W. E. MOORE, A. D. BRIGHT, and METCALF & WALKER for Haywood County.

L. LEHMAN, Sp. J. This cause, which was commenced by a petition for a *mandamus* to require the Justices of the County Court of Haywood County to levy a tax to pay coupons upon bonds issued under the provisions of Chapter 55 of the Acts of the General Assembly of 1869-70, was before this Court on a former appeal of the relator from the action of the Circuit Court of Haywood County, in sustaining various assignments of demurrer to and dismissing the petition.

This Court at the April Term, 1889, reversed such action of the Circuit Court, overruled the demurrer, and remanded the cause for further proceedings.

The opinion of the Court on that appeal is reported in 3 Pickle, 781, and recites so fully the allegations of the petition for *mandamus*, and the grounds of demurrer interposed *in limine*, that it would be mere repetition to state them now, and we content ourselves by referring to that opinion for such allegations and assignments of demurrer.

When the cause was resumed in the Circuit Court the respondents answered, and among other things in their answer, as far as it is necessary to consider the defenses made thereby, because of what was settled by the former decision of this Court, set up that the Act of 1869-70, Ch. 55,

was not legally or constitutionally passed by the General Assembly.

As appears from the bill of exceptions taken by the relator, the Circuit Court on this ground denied the peremptory writ of mandamus and dismissed the petition, and the cause is here again on the appeal of the relator.

The sole assignment of error to be considered on the present appeal involves the inquiry whether, the Act of the Legislature under which the bonds, of some of which the coupons in question represent the interest for certain periods of time, was passed by the Legislature in conformity to constitutional requirements.

That Act was passed, or purported to have been passed, on February 8, 1870, at which time our Constitution of 1834 was in force, and under the provisions of which its validity must therefore be tested.

The parts of the Constitution of 1834, as far as applicable to the objections made to said Act, were contained in Sections 17, 18, and 21 of Article II. thereof, which are as follows:

“Sec. 17. Bills may originate in either house, but may be amended, altered, or rejected by the other.

“Sec. 18. Every bill shall be read once on three different days, and be passed each time in the house where it originated, before transmission to the other. No bill shall become a law until it shall be read and passed on three days in each house, and be signed by the respective Speakers.

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"SEC. 21. Each house shall keep a journal of its proceedings, and publish it, except such parts as the welfare of the State may require to be kept secret."

Chapter 55 of the Acts of 1869-70, as published among the Acts of that session, is entitled "An Act to confer upon the town of Brownsville, in the county of Haywood, the authority to issue corporation bonds in aid of railroads, and for other purposes," and, as published, consists of twenty-two sections, is signed by the Speaker of each house, and is recited to have been "passed February 8, 1870." The Act appears to have originated in what was styled "Senate Bill No. 10," concerning which entries are contained in the Senate and House Journals as follows:

"Senate Bill No. 10, To confer upon the town of Brownsville authority to issue corporation bonds. Passed first reading, and was referred to the Committee on Internal Improvements." October 8, 1869, Senate Journal, p. 21.

On Thursday, October 28, 1869, the Committee on Internal Improvements reported, recommending the passage of the bill. Senate Journal, p. 81.

On the same day the bill passed its second reading, and is then styled, "Senate Bill No. 10, To confer upon the town of Brownsville authority to issue corporation bonds in aid of railroads." Senate Journal, p. 85.

On November 1, 1869, Senate Bill No. 10, then styled, "To confer authority upon the town of

Brownsville to issue bonds," passed third reading. Senate Journal, p. 89.

On November 10, 1869, Senate Bill No. 10 passed first reading in the House. House Journal, p. 181.

On January 28, 1870, Senate Bill No. 10 "was taken up and passed its second reading, and made the special order for 10:30 o'clock to-morrow." House Journal, p. 562.

On January 29, 1870, Senate Bill No. 10 "was taken up. Mr. Thomas offered the following amendments: In first section strike out 'semi-annually' and insert 'annually,' and strike out 'six per cent.' and insert 'eight per cent.,' \* \* \* which was adopted, and the bill, as amended, passed its third reading." House Journal, p. 565.

In the Senate, January 31, 1870, a message was received from the House, returning Senate Bill No. 10 amended and passed; whereupon the amendments were read and referred to the Committee on Internal Improvements. Senate Journal, pp. 346, 347.

On February 1, 1870, the Committee on Internal Improvements, to whom was referred amendments to Senate Bill No. 10, recommended "a concurrence on the amendments of the House, which constitute the twenty-sixth section, and a non-concurrence in all of the other House amendments." Senate Journal, p. 351.

On the same day, "House amendments to Senate Bill No. 10, To authorize the town of Brownsville

to issue corporation bonds," were non-concurred in, except the amendment which constitutes the twenty-sixth section of the bill, which was concurred in. Senate Journal, pp. 352, 353.

On February 1, 1870, a report was received in the House, from the Clerk of the Senate, as follows: "I am directed to return Senate Bill No. 10, 'To authorize the town of Brownsville to issue corporation bonds,' the House amendments non-concurred in, except the twenty-sixth section, as amended." House Journal, p. 590.

On February 2, 1870, the House insisting upon its amendments, the Senate adhered to its non-concurrence, and asked for a committee of conference. Senate Journal, p. 373.

On February 4, 1870, in the House, Senate Bill No. 10 was taken up, after notification that the Senate requested a committee of conference, and the House appointed a committee of conference on its part. House Journal, pp. 630, 631, and 632.

On Saturday, February 5, 1870, a report from the conference committee was received in the Senate, as follows: "Your committee of conference, to whom was referred Senate Bill No. 10, with House amendments, beg leave to report the accompanying bill in lieu of said bill and amendments, in which is embraced substantially all the provisions of both Houses. Your committee deem it prudent to propose a bill in lieu, as the original had been much disfigured by amendments, inter-

lineations, and erasures. Your committee ask that the bill be accepted and passed." On motion, the report of the committee was concurred in, and it was ordered that the bill, with the report, be immediately transmitted to the House. Senate Journal, p. 375.

On February 7, 1870, in the House, Senate Bill No. 10, with the report of the Committee of Conference, was taken up and the report concurred in. House Journal, pp. 645, 646.

On February 18, 1870, the Committee on Enrolled Bills reported to the Senate that they "have examined Senate Bill No. 10, and find it correctly enrolled." Senate Journal, p. 416.

On February 21, 1870, a message was received by the Senate from the House, returning Senate Bill No. 10, signed. Senate Journal, p. 424.

The insistence of the defendants is, that the Act of February 8, 1870, was a new bill, different and distinct from Senate Bill No. 10, and, as such, was not read in each of the houses of the General Assembly, as required by the Constitution. The construction placed on the constitutional provisions in relation to the steps to be taken by the Legislature in enacting bills, under the decisions of this Court, is to the effect that, while the journals will be considered in determining the validity of an Act of the Legislature, every reasonable inference and presumption will be drawn and indulged in favor of the regularity of its passage, "and where it did not affirmatively appear not to



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have passed, and such legitimate construction could be given to the record as sustained the law, it would be done." *Brewer v. Mayor, etc., of Huntingdon*, 2 Pickle, 732.

In *State v. Algood*, 3 Pick., 163, the rule is thus expressed: "We think the rule is well settled that where the journal does not affirmatively show the defeat of the bill, every reasonable inference and presumption will be indulged in favor of the regularity of the passage of an act subsequently signed in open session by the Speakers." *Williams v. State*, 6 Lea, 549; *State v. McConnell*, 3 Lea, 328.

Keeping this rule in view, we proceed to consider the grounds upon which the Act of February 8, 1870, is assailed:

*First.*—It is assumed that the title of the Act was different from that of Senate Bill No. 10, and that the title of the latter was never amended in the Senate or House. This idea is evolved from the fact that on the Journal of the Senate, Senate Bill No. 10 appears to have been styled as a bill "To confer upon the town of Brownsville authority to issue corporation bonds," and the Act, as published, is entitled "An Act to confer upon the town of Brownsville, in the county of Haywood, the authority to issue corporation bonds in aid of railroads, and for other purposes."

By reference to the Senate and House Journals, it will be seen that Senate Bill No. 10, before its commitment to the committee of conference, was

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also entered under the titles, "To confer upon the town of Brownsville authority to issue corporation bonds in aid of railroads," and "To confer authority upon the town of Brownsville to issue bonds."

There was no such duty imposed on the General Assembly by the Constitution of 1834 as that of entering on the journals of both or either of the houses, *in ipsissimis verbis*, the title of every bill or Act they might adopt.

In *Field v. Clark*, 143 U. S., the Court said: "In regard to certain matters, the Constitution expressly requires that they shall be entered on the journal. \* \* \* But it is clear that in respect to the particular mode in which or with what fullness shall be kept the proceedings of either house relating to matters not expressly required to be entered on the journals—whether bills, orders, resolutions, reports, and amendments shall be entered at large upon the journals, or only referred to and designated by their titles or by numbers—these and the like matters were left to the discretion of the respective houses of Congress." In the nature of things, legislative journals are frequently "constructed from loose memoranda, made in the pressure of business, and amid the distractions of a numerous assembly."

It would in many instances operate to defeat the will of the Legislature, as expressed in published approved statutes, if the passage of bills was made to depend on entire and exact agreement of the entries of the titles on the journals, with the

titles as contained in the drafts thereof as introduced and subsequently signed by the Speakers.

The title of Senate Bill No. 10, as found on the journals, may well be treated as an abbreviation of the title thereof as prefixed to the published Act, or as a clerical omission of a part of the title from the journal. Such a conclusion is in harmony with the rule that every reasonable presumption will be indulged to support the regularity of the passage of laws, and is promotive of the policy that legislative acts should, if possible, be sustained.

*Second.*—Objection is also offered to the validity of this Act of 1870, because Senate Bill No. 10 contained at least twenty-six sections, with the contention that this appears from the journals of the Senate and the House. On this averment the appellees base the conclusion that these were distinct bills. Taking it for granted that Senate Bill No. 10, as it went into the hands of the committee of conference, contained twenty-six sections, does it necessarily follow that it was distinct from what is now the Act of 1869-70, Ch. 55? True it is that the latter has only twenty-two sections. The history of Senate Bill No. 10 is that the committee of conference drafted it. In doing so they might, without substantially changing it, have reduced it to twenty-two sections.

We have examined the House and Senate Journals of the Session of 1869-70, and have not been able to find therein any entry or allusion to any

bill which relates to the subject-matter of that Act besides Senate Bill No. 10.

It can further be said that the mere recital on the journal of, or reference to, the twenty-sixth section does not countervail the evidence found on the face of the Act of the actual existence of only twenty-two sections. Under the rule which is here applicable, the more potent and persuasive evidence is that which will support the Act. So that if this fact of twenty-six sections were vital, it would be adjudged, for the purposes of this case, not to exist. To hold that Senate Bill No. 10 and the Act are not in fact one, would be to reverse the presumption which is indulged, for salutary ends, to save statutes from becoming inoperative.

*Third.*—The third proposition, on which it is contended that the Act of February 8, 1870, is void, is the fact that Senate Bill No. 10, before it went to the House, had in its first section the words “semi-annually,” which was proposed to be amended in the House by inserting in lieu thereof “annually,” and the words “six per cent.,” for which in the House the words “eight per cent.” were proposed to be substituted, and the Act, as presented, has no words of similar import, or of a kindred nature in its first section.

This comment is made to prove that the Act was a new bill. The fact that when the bill was redrafted by the committee of conference, the different sections may have been transposed, did not make it a new bill so as to require three

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readings thereof, when it should be returned to the houses for further action, because it would be obviously immaterial that various parts thereof were moved, so to speak, from one to another place therein.

In this connection the Act is criticised on account of the failure of the committee of conference to insert in the bill the amendments proposed in the House by the words "annually" and "eight per cent.," and the insertion by them on the subject of interest "not exceeding the rate of interest at the place where said bonds are payable," without any reconsideration in either chamber by which Senate Bill No. 10 had been passed.

The committee of conference, evidently by mutual concession, and upon proper deliberation, adjusted the differences which they had been commissioned to settle.

There was no necessity, when the report was submitted to the Senate, for that body to reconsider their former action, any more than it would have been essential for them to do so if they had, in the first instance, concluded to acquiesce in the amendments proposed by the House. Senate Bill No. 10 had not been rejected in either house. It was first regularly passed in the Senate, then passed with amendments in the House, which amendments were non-concurred in, and then it was put into the hands of a committee of conference, who reported, and their report was approved by both houses. Upon an examination of

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the journals of the two houses of the Legislature, it will be found to have been common practice to adopt bills upon the reports of committees of conference, appointed after amendments proposed by one of them and not approved by the other, by merely concurring in the report. Such has been the practice of our Legislatures, and it would be unwise now to adopt a rule which might nullify many statutes which have been received by the people as the law of the land, and have become canons of property. But, assuming it to have been necessary for the Senate to have reconsidered the bill after it was returned by the committee of conference, it can be said there is no evidence that this was not done. The journals show no reconsideration; they are silent on the subject. Such silence will be treated as a case of omission. *State v. Algood, supra.*

*Fourth.*—It is further contended that the Act of February 8, 1870, is void, because the Act was passed on that day, and Senate Bill No. 10 was not signed by the Speaker of the Senate or House until on or after February 18, 1870. To maintain this proposition, it is argued that it appears the bill was not enrolled in the Senate until February 21, 1870, at which date the House transmitted the bill to the Senate. For the support of this position, it is asserted that a bill is never signed by the Speaker until it is enrolled or engrossed.

The Senate Journal does recite that on February 18, 1870, the Committee on Enrolled Bills re-

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ported that they had "examined Senate Bill No. 10, and found it correctly enrolled." This, however, does not necessarily prove the date of the enrollment of the bill. It may, notwithstanding the fact that the committee then made the report, have been enrolled prior to that date.

Furthermore, it may be true that a bill is not ordinarily signed until it has been enrolled, but we cannot conclude that it is never so signed, especially when to do so might be to presume against the validity of an act of assembly, instead of making all reasonable presumptions in its favor.

The date of the signing of a bill was not, under the Constitution of 1834, evidence of the day on which it was passed. Bills must necessarily be passed before being signed. In *Dyer v. The State*, Meigs, 237, it was held, in regard to a statute enacted under the Constitution of 1834, that it took effect, not when it was signed, but by relation to a previous date when it was passed. Besides all this, the Constitution of 1834 did not forbid the Speakers from signing bills before their enrollment. The same reasoning may be applied to the entry on the Senate Journal of February 21, 1870, concerning the message of the House returning Senate Bill No. 10, signed, with the further comment that the date of the message is not recited, nor is the date given when it was actually received in the Senate.

It is further argued, that, because the journals fail to show the fact, the Act could not have

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passed February 8, 1870. The silence of the journals does not operate in this way. Their silence on the subject may have arisen from oversight or accidental omission.

*Fifth.*—The only remaining objection to this Act to be considered is that the committee of conference reported a new bill, which was passed without the three readings required by the Constitution. The idea that the bill as it came from the hands of the committee of conference was a new bill, separate and distinct from Senate Bill No. 10, is sought to be supported by the report of the committee. We do not think that, from the record, we are authorized to adjudge that the committee intended to report a new bill, or that they did so. The committee did say they deem it prudent to propose a bill in lieu. This language, standing alone, might ordinarily signify that the committee had devised a new bill. But the words are qualified by the statement that the accompanying bill "embraces substantially all the provisions of both houses."

The reasonable conclusion which may be deduced from the report, is, that the committee simply re-drafted the bill; and they manifest this themselves by giving as their reason for having done so, the fact that the "original bill had been much disfigured by amendments, interlineations, and erasures."

Doubtless the two houses had access to the original of Senate Bill No. 10 when they considered the report of the committee, and it is not



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to be presumed that they would have omitted to make proper comparison for their guidance in regard to the action to be taken thereon, so as to enable them to decide whether the committee had reported a new bill.

We will not presume that the Legislature were derelict in such an important particular. The Legislature is a co-ordinate department of the government with the judiciary, is invested with very high and responsible duties, and they act under the solemnity of an official oath which it is not to be supposed they will disregard. Cooley's Const. Lim., p. 217.

After a full consideration of the objections made to this Act of the General Assembly, we have reached the conclusion that such objections are not well taken.

The cause was tried below without a jury, and our duty is to render such judgment as ought to have been rendered in the Circuit Court.

The judgment is reversed. Let the peremptory writ of *mandamus* issue, as prayed for in the petition.

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DISSENTING OPINION.

TURNER, Ch. J. The suit is to enforce the collection of bonds issued to Holly Springs and Ohio Railroad Company, under an Act claimed to have been passed in February, 1870. The bill

was introduced in the Senate on October 8, 1869, where it passed the three readings; went to the House, passed first reading; was amended, and passed second reading; again amended, and passed third reading. House amendments were referred to Committee on Internal Improvements, which recommended concurrence in the amendments of the House as to the twenty-sixth section, and non-concurrence as to the others.

Senate non-concurred except as to the twenty-sixth section. House refused to recede from its amendments. Senate adhered to its non-concurrence, and asked for a committee of conference. Both Houses appointed its members of said committee.

The conference committee reported to the Senate a "bill in lieu," and asked that it be adopted. The report is as follows: "Mr. Speaker—Your committee of conference, to whom was referred Senate Bill No. 10, with House amendments, beg leave to report the accompanying bill in lieu of said bill and amendments, in which is embraced substantially all the provisions of both houses. Your committee deem it prudent to propose a bill in lieu, as the original bill has been much disfigured by amendments, interlineations, and erasures. Your committee ask that the bill offered be accepted and passed. All of which is respectfully submitted."

The report was concurred in by the Senate on the fifth of February, 1870—the date of the report—and by the House on the seventh.

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The Constitution is: "Bills may originate in either house, but may be amended, altered, or rejected by the other." Without repeating the history of the bill, we have seen that this bill did not originate in either house, but in the committee of conference from both houses, for which there is no constitutional authority, but, on the contrary, a direct prohibition, under the facts here. The word "may," as employed in the clause of the Constitution quoted, means "shall," and excludes all idea of the origination of a bill elsewhere than in the one or the other house; and a conference committee, composed of members from each house, is not contemplated in the term "either house."

The committee reported "a bill in lieu," and so define it as often as twice, and, I might say, three times in their short report. It was offered, as the title given it by the committee imports, in place of and as a substitute for the original bill and amendments.

However we look at the language of the report, it conveys no other idea than the offering of a new bill.

The language, "in which is embraced substantially all the provisions of both houses," is a conclusion which the committee had no authority to suggest. That was the province of the two houses.

The new bill did not pass the three readings in each house, but was simply concurred in by

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each house—by the Senate on the fifth and by the House on the seventh of February.

The provisions of the Constitution are intended to protect the people of the State against hasty and ignorant legislation, and ought to be strictly construed. All rules made by the Legislature governing its proceedings must conform to the Constitution, of which it is a creature.

Rules not in strict conformity to the Constitution are not valid, and all laws passed under them are void.

In this matter we are construing our Constitution, and authorities from other States are of little value except for their reasoning; and in weighing reasons we must have an eye to the public policy that may induce it. The parliamentary rules of Congress can be of little service, as there is no such provision in the Constitution of the United States.

Whatever may be the holdings of other States with similar constitutional provisions, we must interpret our language for ourselves, and assume that the framers of the Constitution meant what they said, and used the words of that instrument in the sense of their common acceptation and meaning. There being no law authorizing their issuance, the bonds are nullities, and no obligation rests on the county for their payment.

For these reasons I do not concur with the majority.

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CALDWELL, J. I think it affirmatively appears from the journal that the bill reported by the conference committee was a new bill, and that, as such, it did not pass three readings; and, hence, that the Act was not constitutionally passed, and is void.

## \* H. CLAY KING v. STATE.

(Jackson. July 7, 1892.)

1. CHANGE OF VENUE. *Refusal of, not reviewable, when.*

Discretion of trial Judge refusing change of venue in a criminal case will not be reviewed on appeal except in a clear case of abuse. This is not a case for review of that discretion. (*Post*, p. 622.)

Cases cited and approved: *Porter v. State*, 3 Lea, 496; *Holcomb v. State*, 8 Lea, 417; *Poe v. State*, 10 Lea, 673.

2. CONTINUANCE. *Refusal of, for undue excitement not erroneous, when.*

Continuance of criminal case for "too great excitement, to the prejudice of defendant," rests in the sound discretion of the Court. Refusal of second continuance upon that ground and others, is not erroneous in this case. (*Post*, pp. 622, 623.)

Code construed: § 6038 (M. & V.).

3. JURY. *Disqualifying opinion as ground for new trial.*

After verdict a strong presumption obtains, even in a criminal case, in favor of the competency of a juror who was selected and sat upon the trial; and a clear case must be proved against such juror to justify the granting of a new trial upon the ground that he had formed or expressed an opinion about the case before he was selected. (*Post*, pp. 623, 624.)

Case cited and approved: *Mann v. State*, 3 Head, 377.

4. SAME. *Same.*

And the accused juror is a competent witness upon the trial of such issue. His denial, supported by proof of his good character or by corroborating circumstances, may be sufficient to rebut the evidence of one or more attacking witnesses. (*Post*, pp. 623, 624.)

Cases cited and approved: *Rader v. State*, 5 Lea, 610; *Johnson v. State*, 11 Lea, 47; *Mann v. State*, 3 Head, 373.

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\* King's sentence of death was commuted by Governor Buchanan to life imprisonment.—REPORTER.

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5. SAME. *Separation of. General rules.*

Separation of jury *prima facie* vitiates their verdict. The separation may, however, be explained. The burden is upon the State to explain it. An explanation is sufficient that covers all that occurred during the separation, and shows clearly either that there was no communication with the jury during the separation or that such communication as was had was not of a prejudicial character. (*Post*, pp. 624-627.)

Cases cited and approved: *Stone v. State*, 4 Hum., 27; *Hines v. State*, 8 Hum., 601; *Riley v. State*, 9 Hum., 646; *Rowe v. State*, 11 Hum., 492.

6. SAME. *Same. Passing across State line.*

The passing of the jury across the State line is not, of itself, a separation, but, treating it as such, if the jury remained in strict charge of their officers, and had no communication with any one, their verdict is not thereby vitiated. (*Post*, pp. 626-628.)

7. SAME. *Same. Same.*

Although the jury and its officers may have passed outside the State and beyond the local jurisdiction, the Court has the power to punish them for misbehavior on their part occurring outside the State. (*Post*, pp. 627, 628.)

Case cited and approved: *McCarthy v. State*, 89 Tenn., 543.

8. SAME. *Exposure of jury to contact with and remarks by by-standers.*

The verdict of the jury is not vitiated—there being no misconduct on their part or on the part of their officers—by such unavoidable or necessary contact with by-standers as occurs ordinarily during trials, nor by any remarks made in their presence by by-standers. (*Post*, pp. 628, 629.)

Cases cited and approved: *Brake v. State*, 4 Bax., 361; *Turner v. State*, 89 Tenn., 548.

9. SAME. *Use of intoxicating liquors.*

Jury's use of intoxicating liquors does not vitiate their verdict when it appears there was no excessive indulgence. (*Post*, pp. 629, 630.)

Cases cited and approved: *Stone v. State*, 4 Hum., 26; *Rowe v. State*, 11 Hum., 491.

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10. SAME. *Communication between jurors and outsiders.*

All communications, whether by letter or oral, between jurors and outsiders, without leave and supervision of the presiding Judge, are improper. The practice of allowing such communications upon permission of the officer alone is disapproved. The burden is upon the State to explain such communications. This explanation may be by direct evidence or by the circumstances attending the communication, or by both. All communications shown in this case are sufficiently explained. (*Post*, pp. 637-638.)

Cases cited and approved: *Brake v. State*, 4 Bax., 361; *Luster v. State*, 11 Hum., 169.

11. EVIDENCE. *Cross-examination of defendant in murder case.*

In a murder case, the defendant having testified in his own behalf to his own peaceable character, may be required to answer, on cross-examination, as to his former violent conduct and breaches of the peace toward persons other than the deceased. (*Post*, p. 638.)

12. SAME. *Same.*

So, likewise, the defendant, having volunteered to prove for himself an honorable military career and record, may be interrogated, on cross-examination, as to particular incidents in that career. (*Post*, p. 638.)

13. SAME. *Proof of motive and malice.*

King killed Poston. State's theory, assassination; King's theory, self-defense. King claimed that in a certain litigation between himself and Mrs. Pillow, Poston, as the latter's attorney, had in a certain pleading used language derogatory to the character of Mrs. King; that he, as a loyal and loving husband, sought Poston, and demanded retraction, and that an altercation ensued, in which he killed Poston in self-defense. King put portions of the record in the King-Pillow litigation in evidence. The State undertook to show that the reference in the pleadings to Mrs. King was not derogatory to her but to defendant; that King had abandoned his wife, and had long sought to divorce her, in order to marry Mrs. Pillow; that he had conveyed all his property to the latter, his suit being an effort to recover it; and that revenge and the desire to rid himself of a formidable adversary in the litigation, prompted him to kill Poston. The Court admitted in evidence the portions of the record not offered by defendant, the deeds made by King to Mrs. Pillow, and proof of the relations, social and otherwise, of King and Mrs. Pillow.

*Held*: This evidence was admissible for the purpose of showing motive, and to contradict defendant, and as part of a record the other portion of which defendant had introduced. (*Post*, pp. 638-642.)



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14. ARGUMENT OF COUNSEL. *Allusions by Attorney-general to other cases. Exception.*

Mere allusions by the Attorney-general, in his closing argument, to other cases tried in the same Court and affirmed upon appeal, by way of illustration, afford no ground for a new trial where no exception to the argument was taken at the time it was made. (*Post*, pp. 642-644.)

Cases cited and approved: *Northington v. State*, 14 Lea, 424; *Staples v. State*, 89 Tenn., 231; *Swayne v. State* (oral opinion), Jackson, 1890.

15. SAME. *Requests to charge concerning.*

It is not error for the Court to refuse to give requests touching alleged improper argument by the attorney-general, where they are so framed as to be a sweeping criticism of the argument, pointing out no specific objections to it, or where they are not justified by the record, or where good and bad propositions are indiscriminately intermingled. (*Post*, pp. 644, 645.)

16. NEW TRIAL. *Not granted for newly-discovered evidence, when.*

New trial will not be granted in a capital case on account of newly-discovered evidence in support of the plea of insanity, the evidence being merely cumulative, and no diligence to obtain it on the first trial being shown, and its character such that the result would not be thereby changed. (*Post*, p. 645.)

17. CHARGE OF COURT. *As to premeditation.*

The Court's charge as to premeditation is quoted and approved. (*Post*, pp. 645, 646.)

18. SAME. *As to insanity.*

The Court's general charge as to insanity is approved, though not quoted, as being in accord with the leading case of *Stewart v. State*, 1 Bax., 178. (*Post*, pp. 646, 647.)

19. INSANITY. *Burden of proof.*

Upon plea of insanity in criminal case, the defendant being presumed sane, the burden is upon him, in the first instance, to prove insanity. The proof of insanity may, however, occur in the State's evidence. That proof of insanity is sufficient which raises a reasonable doubt upon that point. (*Post*, pp. 647, 648.)

Cases cited and approved: *Stewart v. State*, 1 Bax., 178; *Dove v. State*, 3 Heis., 370.

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20. ARREST OF JUDGMENT. *Must rest upon matter of record.*

Motion in arrest of judgment must be based upon matter of record, and not upon any matter *dehors* the record. *A fortiori*, it cannot be maintained upon affidavits contradictory of the record. (*Post*, pp. 648-650.)

Cases cited and approved: State v. Allison, 3 Yer., 428; State v. Rogers, 6 Bax., 563.

21. DYING DECLARATIONS. *Written.*

When dying declaration, otherwise admissible, is reduced to writing, and signed by the declarant, that being the only declaration made, the writing is admissible in evidence. (*Post*, pp. 649, 650.)

22. VERDICT. *Approved upon the facts.*

The Court approves the jury's verdict based upon the State's theory of assassination. (*Post*, pp. 651-653.)

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FROM SHELBY.

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Appeal from Criminal Court of Shelby County.  
J. J. DUBOSE, J.

C. B. MILLER, W. G. WEATHERFORD, JAMES M. GREER, LEE THORNTON, and T. W. & R. G. BROWN  
for H. Clay King.

Attorney-general PICKLE, GEO. B. PETERS, District  
Attorney-general; TURLEY & WRIGHT, and GANTT &  
PATTERSON for State.

LURTON, J. This is an appeal from a conviction of murder in the first degree. The transcript

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consists of two thousand five hundred pages of printed matter. It will, therefore, be impossible, within the compass of a legal opinion, to present any thing like an analysis of this vast mass of evidence. All that we can hope to do is to state the errors which have been assigned by counsel, and briefly state our conclusion upon them.

*First.*—The application of the defendant for a change of venue was refused, and this is assigned as error. Such an application is addressed to the sound discretion of the trial Judge, and this discretion will not be reviewed, unless a strong case is made out, showing an abuse of that discretion. *Porter v. State*, 3 Lea, 476; *Holcomb v. State*, 8 Lea, 417; *Poe v. State*, 10 Lea, 673.

We have carefully examined the evidence heard by His Honor, bearing upon this application, and we are unable to discover any abuse of his power. This is made the more evident from the fact that a jury was obtained without the exhaustion of the peremptory challenges allowed the defendant, and without the exhibition of any popular excitement.

*Second.*—The second application for continuance was properly disallowed. The indictment was found during the January term, 1891, of the Court. After arraignment and plea, the case was set for trial for April 6, 1891—a day of the same term. At this date, an application for change of venue was overruled, and the case again set for April 13. At that date the case was continued, upon application of the defendant, to the next term,

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upon the ground of "undue excitement and prejudice," and for other causes; and, upon motion of the defendant, set for trial for the first Monday in June, 1891. On this date, the application for change of venue was renewed, and overruled, and then the defendant applied for a second continuance, upon the ground of the prejudice which he averred still existed against him in Shelby County.

Since the Act of 1875, § 6038 Code of Milliken and Vertrees, a continuance because of too great excitement rests in the sound discretion of the Court. The Court had, when this application for continuance was made, already granted one continuance, and we see no error in his refusal of a second.

*Third.*—It is next assigned as error that Juror Smith had, previous to the trial, formed and expressed an opinion adverse to the defendant. On the original examination of this juror, he admitted that he had read the newspaper accounts of the killing of Poston, and that he had talked about the case with several parties. He said, however, that he had formed no opinion, and that he could render a verdict upon the law and evidence presented.

"From the fact that the juror was selected, he must be presumed to be competent. To overthrow this, a clear case must be made out against him." *Mann v. State*, 3 Head, 377.

The witness, White, by whom it was sought to show that the juror had expressed an opinion ad-

verse to the defendant, shows himself to have been a partisan of the defendant. His memory as to the conversation with Smith was not clear. He had heard a large number of persons express opinions adverse to the defendant, and it is by no means clear that he had not confused, what was at best but a casual conversation with Smith, with what he had heard others say.

Smith denies that he had ever expressed such an opinion to Dr. White. He is shown to be a man of good character, and had no particular acquaintance with either the defendant or the deceased.

The witness, Hessin, also relied upon to show that Juror Smith had an opinion, was impeached by his contradictory statements made to Gaither and to W. K. Poston. Besides, he refused to *swear* that he had heard Smith express an opinion, saying he could only *state* his impression or belief.

That the juror is a competent witness, and that his denial, supported by proof of good character or by corroborating circumstances, is sufficient to rebut the evidence of an attacking witness, is established by our cases. *Rader v. State*, 5 Lea, 610; *Johnson v. State*, 11 Lea, 47; *Mann v. State*, 3 Head, 373.

*Fourth.*—Misconduct of jury. Under this general assignment a number of instances of alleged misconduct are relied upon as vitiating the verdict and requiring a new trial.

The well-settled rule in felony cases requires that the jury shall be kept together, and separate

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and apart from other persons, and that there shall be no communication between them and persons not on the panel. That this rule may be enforced, the law requires that the jury shall be put under the charge of an officer sworn to keep them together and to prevent them from mingling with others, or having any communication with persons not of the jury, and to have none with them himself in regard to the case.

This procedure in high grades of crime has, from the earliest history of this State, been regarded as essential to the common law right of trial by jury guaranteed by our Constitution, and as a practice tending to prevent extraneous and improper influences from affecting the jury charged with the liberty or life of the citizen.

While there is no uniformity of decision in the Courts of England or America as to the legal effect of evidence of a separation without more, yet the weight of authority elsewhere, and the unbroken line of opinion in this State, is, that, *prima facie* the verdict is vitiated by the fact of separation. If, however, it is made to appear that the misconduct could not have been harmful to the defendant, then it is not ground for a new trial.

"It is the opportunity of tampering with a juror afforded by the separation," said Chief Justice Deaderick, "which constitutes the ground for a new trial; but if such separation afforded no such opportunity, there can be no excuse for a new trial." *Cartwright v. State*, 12 Lea, 625.

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Where all that occurred during a separation is fully explained, and it can be clearly seen that there was no opportunity for improperly influencing the jury, or that the communication had with the jury was not calculated to improperly affect them, then to set aside a verdict otherwise sustained would be to sacrifice substance to form and bring the administration of law into just discredit. *Greenlow v. State*, 4 Hum., 27; *Hines v. State*, 8 Hum., 601; *Riley v. State*, 9 Hum., 646; *Rowe v. State*, 11 Hum., 492; *Cartwright v. State*, 12 Lea, 625.

Having in view these principles governing such trials, we will briefly examine the facts mainly relied on as showing a violation of the rule requiring the jury to be kept together and prohibiting communication :

1. That the jury, during the trial, went beyond the border of the State. The facts are these. This trial took place in midsummer, at Memphis, on the Mississippi River. It lasted thirty-three days. The health and comfort of the jury made it proper that the jury, during so protracted a trial, should, under proper supervision, be given opportunity for exercise. For this purpose, during the adjournments of the Court, they were several times taken for walks and rides in and about the city and suburbs. Upon one of these occasions, accompanied by two specially sworn officers, they were taken on board the ferry-boat which plies between the Tennessee and Arkansas sides of the river. When the boat

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made its landing on the western or Arkansas shore, the jury were permitted to walk up on the bank of the river, where they stood for a few minutes, or until the boat was ready to make its return trip. During the entire trip the jury were kept together, and there was no mingling with other persons, and no communication whatever between jurors and other persons. It is now insisted that, while thus without the State, the jury, in legal effect, were dispersed, and no longer under the legal control or custody of the Court's officers; that while beyond the State, the officers had no right to control or restrain the jury, and the Courts of this State no power to punish for any act in disobedience of its rule or contempt of its authority done beyond the border of the State. If all this be admitted, yet it does not follow that the verdict is necessarily vitiated. It being affirmatively shown that, during the period covered by this alleged dispersal, the jury did not, in fact, separate, and that, in fact, they had no sort of communication with outsiders, the case is taken thereby without the rule, which vitiates the verdict only where a separation is unexplained. The assumption that the Court would have had no authority to punish an act in contempt of its authority affecting its jury or its process is not supported. In McCarthy's case, it was ruled that a Court of this State might punish for contempt committed in another State, by there attempting to induce a witness to disobey the process of the Court which



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had been executed upon him while within this State. 89 Tenn., 543. Whether the officers in charge of the jury could or could not lawfully restrain the jury while outside the State, is unimportant, in view of the fact that their authority was not brought in question, the jury remaining together and avoiding communications without requiring the exercise of force.

2. In going in and out of the crowded court-house, and in passing upon the streets for air and exercise, or between the hotel, where boarded, and the court-house, there was necessarily some crowding and jostling of the jury. It is argued that this afforded opportunity for improper communications, and vitiated the verdict. Upon these occasions the jury were as carefully guarded as was possible, and there was no actual separation. No communication with the jury is shown, save in one instance, to be hereafter considered. It is not shown that any prejudicial observations were ever made to the jury when thus in necessary contact with others. Where the jury is guilty of no misconduct, but are involuntarily subjected to observations of by-standers, even though intended to prejudice the defendant, it will not raise any legal presumption against the verdict. It is the misconduct of the jury resulting in the opportunity for the exercise of improper influence, or in the reception of prejudicial communications, which justifies the inference of harmful results to the defendant. If the involuntary hearing of prejudicial

observations, whether in the jury-box or on the streets, should operate to raise a legal inference of undue influence, jury verdicts would be of little stability. *Brake v. State*, 4 Bax., 361, and *Turner v. State*, 89 Tenn., 548, are cases illustrating the non-application of the general rule, although very prejudicial communications were made to the jury by by-standers. The jury being guilty of no misconduct, the defendant was held not to have been affected. The presumption of right acting attends the jury so long as it is guilty of no misconduct. Here, without evidence of any effort to influence the jury by by-standers, we are asked to presume that, because while in the jury-box persons could pass near enough to them to have made observations, or while on the streets or in passing in and out of the court-room, or in public conveyances, that because it was possible for them, though under the guardianship of two vigilant officers, to have received communications, that therefore we are to presume that they were subjected to prejudicial influences. No such presumption arises, and the objection is frivolous.

3. There was evidence that the jury had been permitted to send for and drink intoxicating liquors, such as whisky, wine, and beer. There was no abuse of this privilege, and not the slightest evidence that any juror was in any degree rendered incompetent or less capable of an intelligent discharge of his duties by these indulgences. The old rules, which prevented juries from eating

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or drinking, have long since been so far modified as to require evidence of some excess to authorize the setting aside of a verdict in consequence of mere irregularities. *Stone v. State*, 4 Hum., 26; *Rowe v. State*, 11 Hum., 491.

4. The jury were carried into a store, that Juror Mustin might order some supplies sent to his family. Some two or three persons were in the store, among them one Rawlins, a neighbor of Mustin. The juror inquired about his family. The witness, Rawlins, says he replied "that I saw his wife, and they were all well a few days ago." He then adds: "I says, well, I reckon you are getting tired, very tired, of this; and he says, 'Yes; I wish I could go home.' I just remarked, What do you think? and he says, 'It will be a hung jury.'" Mustin was not separated from his fellows when this occurred. A part of the jury, under one officer, were about the middle of the store, it being some seventy feet deep, the rest, including Mustin, under another officer, went to the rear of the store to the water-bucket. As these were moving toward their fellows in the front, the witness, Rawlins, who was sitting by the counter, was passed by the jurors, and the conversation detailed had. It was very reprehensible in the witness and in the juror, but it is thoroughly explained. There was no attempt to influence the juror, and any presumption arising from an attempt by a stranger to communicate with a juror is rebutted by the undisputed evidence of the very witness relied upon to estab-

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lish the communication, which shows that nothing prejudicial to the defendant was said.

5. There is evidence that Juror Mustin wrote and mailed a letter while on the jury. But it is shown that it was written to his wife, examined by the officer in charge of the jury, and that it contained nothing in any way affecting the defendant. This matter may be, therefore, dismissed from further consideration.

6. It also appears that the same juror received a letter from his wife. The contents of this do not fully appear. It does, however, appear that the letter was opened and read by the officer with the jury, and by him permitted to go to the juror. It is argued that this is an unexplained communication, and, as such, vitiates the verdict.

There is a very close connection between the rule concerning separation and that affecting communications. A separation is only prejudicial when it leads to improper communications, and that it did so, will be presumed where opportunity for such communication was thereby afforded. Communications, whether to a single juror, separated from his comrades, or to the whole jury, are equally prohibited, and a presumption of prejudice arises when the mere fact of communications is shown without explanation. This inference of harm may be overturned by the circumstances under which it was had, if, from them, it clearly appears that the jury were guilty of no misconduct; as, where by-standers make observations, which are

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unwillingly heard by the jury, who, otherwise, are in discharge of their duty. *Brake v. State, Turner v. State, supra*. So, if the facts concerning the communication clearly tend to show its harmless character, a new trial will not be granted, even though the juror was guilty of misconduct in engaging in a violation of his duty. *Riley v. State, supra*, is a case illustrating this. That was a capital case. Two jurors were shown to have conversed with persons not on the panel. These conversations were explained. This Court said:

“A separation of the jury, or a conversation unexplained, we have held a good cause for a new trial, because, in such case, we cannot know that the juror thus separating himself, or thus conversing, was not tampered with. But, on the other hand, it is the settled law of this Court that such separation or conversation may be explained; and, although the juror may and ought to be punished, yet, when it is satisfactorily shown that he was not tampered with, and that no influence unfavorable to the prisoner could by possibility have existed, it is no cause for new trial.” To same effect is *Luster v. State*, 11 Hum., 169.

The *conscious misconduct of the juror* in holding the communication, furnishes the basis for the inference that he has been tampered with. Where this element is missing, the presumption does not and should not arise, but the effect of the communication upon the verdict should be made to depend upon the circumstances.

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The rule, as deduced from the cases by Thompson & Merriam, in their very valuable work on juries, seems to us sound. It is this:

“Whether a communication, then, will afford ground for new trial must depend upon its harmful tendency; and this is to be determined according to the circumstances of each case, having reference to the nature of the communication, the person making it, the time when, the place where it was made, and other surroundings.” Sec. 348.

Testing this assignment of error by this common sense rule, is it so far explained as to leave no doubt upon the mind of a Court that the juror was not improperly influenced by the communication?

(a) It was a letter from the wife of the juror. If it had been from some one interested in the prosecution, or if it had been from some one unknown, the inference arising would be greatly strengthened.

(b) It was opened and read by the officer charged with the custody of the jury, and permitted by him to go to the juror. This is not to be approved. The officer is not the judge of what should be communicated to a juror. But the record shows, without contradiction, that the officer understood that the jurors might, with his knowledge, communicate with their families, and that such had always been the practice in that Court. He furthermore shows that this practice was known to the attorneys of the defendant, and that

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at least one of them knew that during this long and tedious trial the jurors were in the habit of communicating, in the hearing of the officer, with their families. No objection is shown to have been made by counsel to the practice, but it is now sought to fasten upon the instance now under consideration, and secure a new-trial, upon the ground that such communication was unlawful and is not sufficiently explained. We do not wish to be understood as approving the practice shown to exist in the trial Court. But the fact that it has long been understood to be permissible, removes the imputation that the officer or juror were conscious of misconduct in this matter, and in part explains the failure of learned counsel for the State to examine the witness as to the purport of the letter received by the juror.

(c) The evidence as to this letter was brought out by the defendant himself—on cross-examination, it is true; but it was original proof. The juror receiving the letter could have been asked to state the contents of the letter, or to have filed it. He was not. The defendant dropped the subject with the proof that the officer, after opening and reading the letter, permitted him to see it. It is not as if the fact were shown by a witness who knew no more than the fact of the receipt of the letter. The witness knew the purport; the officer knew it; and he, too, was dropped with the mere statement that he carefully examined every letter and note received by the

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jurors. Under all these facts and circumstances, it seems to us that the nature of this communication is clearly shown to have been domestic and harmless; and that, to grant a new trial under these circumstances, upon the assumption that the wife of a sworn and impartial juror has been guilty of tampering with her husband in the interest of the State, would be to extend the rule on this subject beyond the reported cases, and sacrifice the substance to the husk of a technicality.

7. A similar assignment is relied on concerning a communication with Juror Smith. The defendant, as original matter, elicited from this juror, when examined in open Court on motion for new trial, the fact that, when on the jury, he had met his wife and son—a boy of fourteen—in the dining-room of the hotel where the jury were boarded, and there had a conversation with them. The subject was dropped by defendant with the bare proof of this fact, although, as in the instance just passed upon, the evidence was made by himself, and when, if he had entertained any suspicion that he had been, in any degree, prejudiced, he could, by the same witness, have shown its full purport. The facts tending to explain this communication, and indicating its harmlessness, as appearing in other parts of the record, are these:

(a) That Officer Perkins was the responsible officer in charge of this jury. He was assisted by two others; but either Perkins or Officer Harrell were always with the jury, and generally both.



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(b) Officer Harrell shows that when he was with the jury no communication whatever occurred between it and persons not of the panel.

(c) The jury were never separated, and the communication between Juror Smith and his family necessarily occurred when with the jury, and while Officer Perkins or Harrell had charge of it.

(d) Officer Perkins shows that it was the practice in the Criminal Court of Shelby County, in the hearing and presence of the officer in control of the jury, and without special leave of the Court, to permit jurors to speak to members of their family, and to send messages to them by friends. He shows that this practice was known to counsel practicing in that Court, and that at least one of the leading counsel for defendant knew that the practice was being indulged during this trial.

(e) No objection is shown to have been made, during the trial, to this very reprehensible practice; nor does it anywhere appear that the learned Criminal Judge knew of it; nor that his attention was ever called to it by counsel for defendant, who appear to have been fully aware of it.

(f) The fact as to this practice, and the knowledge of defendant's attorney as to its continuance in this case, were drawn from the officer by the defendant, and was original evidence. Defendant also asked the officer this question:

"*Ques.* Can you say that none spoke to them a single word you didn't hear?

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*Ans.* Yes, sir; I will most emphatically.”

From this it clearly appears that all these communications between jurors and their families, whether at the hotel or in the court-house, were heard by the officer. The officer was not asked about particular communications, the defendant contenting himself with this general statement, which clearly covers the particular communication under consideration, as well as all others.

(g) The details of the several communications were not asked for by defendant, though the evidence, as before stated, was original evidence introduced by himself.

(h) The general character and purport of all of them is, however, shown by the officer as part of the defendant's examination, who, as part of his statement concerning his habit to allow these conversations, described the practice thus:

“When a juror would see one of his friends in the court-room, he would call me, and say: ‘I want to speak to so and so, to send some message home.’ We would let that relative come around so the juror could send some message home.”

From all these facts, and under all the circumstances of this case, looking to the persons with whom the juror conversed, the fact that it was in the presence and hearing of his fellows, and with the permission of the officer and in his hearing, the entire absence of any conscious misconduct upon the part of either juror or officer; and in view of the fact that the defendant himself drew

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out the evidence as to the fact of the conversation, and dropped the subject without any effort to show its purport, we are entirely convinced that this communication is sufficiently explained, and that no possible prejudice could have resulted to defendant thereby.

*Fifth.*—Error in admission of evidence.

1. That evidence was admitted as to former violent conduct of defendant, and breaches of the peace toward persons other than deceased. There is nothing in this objection. The defendant was examined as a witness, and voluntarily testified to his own peaceable character, and that he had never, since 1859, been engaged in personal combat. The evidence now objected to was a cross-examination of the defendant as to this evidence in chief. No objection was interposed at the time, and, of course, none can now be heard. The defendant likewise went into his career as an officer in the service of the Confederacy. He was cross-examined as to some facts in this connection. It was a legitimate cross-examination of the defendant as to matters upon which he had been examined in chief.

2. We come now to consider some very sweeping objections to the admissibility of evidence which it has been urgently argued was incompetent and highly prejudicial. These objections may be grouped as follows:

(a) Evidence as to certain conveyances made by the defendant to a Mrs. Pillow.

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(b) Evidence concerning the relations, social and otherwise, existing between Mrs. Pillow and defendant.

(c) Evidence from and concerning certain acrimonious litigations pending between Mrs. Pillow and defendant, and springing out of the peculiar relations they had borne to each other, and the conveyances made to her in consequence of that relation.

In these litigations the deceased, David Poston, who was a lawyer of great eminence and high character, represented Mrs. Pillow as leading counsel. The defendant, King, was, likewise, a lawyer at the same bar, and a legal author of repute and learning. In these suits, involving the entire estate of the defendant, though aided by others, he, in the main, represented himself. The suits were instituted by defendant, who thereby undertook to cancel the deeds executed to Mrs. Pillow, and recover the property thereby conveyed. There was much conflict as to what had been the circumstances and consideration leading to the deeds.

The defendant, as a witness for himself, originally introduced very much of the evidence concerning his relation to and suits with Mrs. Pillow, and his counsel, in argument and brief, have failed to discriminate between that put in by the defendant and that introduced by the State over objection. The criticism of the Court's action concerning this alleged prejudicial evidence has been so indiscriminate and sweeping as to embrace both classes

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of proof. The theory of the defense was on the trial, and still is, that certain statements appeared in an answer in equity, filed by Mrs. Pillow, which seriously reflected upon the character and honor of Mrs. King, the wife of defendant, and that the deceased was responsible for these statements to the husband of the insulted wife. The defendant, by his own evidence, sought to place himself in the attitude of a loyal and loving husband, championing the fame and honor of a devoted wife—as to whom, this record contains not one word to her discredit. To support this honorable motive, he introduced the pleading containing the particular matter complained of, and such other parts of the records in those suits as he regarded necessary. As a witness, he stated his construction of the paragraph alluding to his wife, giving it a meaning absolutely without foundation, and calculated to arouse the stormiest passions which could agitate a manly bosom. He undertook, in advance of assault, to explain his relations to Mrs. Pillow, and the circumstances and consideration moving him to make wills and deeds in her favor, by which he stripped himself of his entire estate. For this purpose, he went fully into the history of his acquaintance with her, and analyzed the character of his affection and attachment, giving his own color, to conduct which, he admits, had occasioned gossip and scandal, and which, seemingly, presented him as the protector and champion of one other than the woman he had vowed at the altar to honor and cherish.

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The State, upon his cross-examination, undertook to meet this theory, and contradict his testimony by the introduction of other parts of the records in the pending suits, and by his own depositions filed therein. It sought to show that the defendant had long cherished the wish to obtain a divorce from his wife, and had agreed to marry Mrs. Pillow when this should be granted. It sought to show that the objectionable pleading had been filed some eighteen months before the assault on deceased, and that nothing contained in it could have properly excited the resentment of defendant.

The defendant had stated the effect of this pleading to have been the destruction of the happiness of himself and wife. "That his old acquaintances on the street avoided him." "The door-bell ceased to ring." The State sought to show that his real motive was revenge. Poston had espoused the cause of Mrs. Pillow, and endeavored to show that the deeds to her rested upon a moneyed consideration. The defendant, to overthrow this, alleged an agreement to marry when he could obtain a divorce. The pleadings were sensational. They naturally found their way to the public press. The result was public disgrace, as well as the possible loss of his entire estate. These considerations the State undertook to show led to such feelings of malice and resentment as resulted in the killing of the lawyer who had stood across his path and subjected him to public disdain and opprobrium. Much of the evidence

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offered by the State on these topics was clearly admissible for the purpose of contradicting the defendant; much was admissible upon the ground that the State was entitled to such other parts of a record introduced by an adversary as relate to the same subject. Still more of the evidence objected to was admissible as independent proof tending to show the motive of the defendant, or contradict that asserted by himself as a witness. We have carefully examined all exceptions reserved to evidence by the defendant, and are clearly of opinion that no reversible error is presented by any one of them.

*Sixth.*—It is next assigned as error that a new trial was not granted, because of alleged intemperate and improper argument by the District Attorney in closing the case. This argument, as taken down by the short-hand reporter, is made part of the bill of exceptions. We have carefully examined it. It does not contain any statement of evidence relating to or affecting this defendant for which there is not some authority in the record. The objections principally urged against parts of it apply rather to the references made by the State's officer to the facts of certain other causes tried in that Court, and resulting in convictions affirmed by this Court. Mere allusions to other causes as illustrations of argument, has been held by this Court, in one of its best considered cases, to be insufficient ground for a new trial. *Northington v. State*, 14 Lea, 424.

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No objection was made, or exception reserved, to any part of the argument now complained of. The trial Judge ought not to be put in error for failing to check or reprove mere intemperate argument, or historical reference to the facts and results in other causes unless objection be taken at the time and a ruling requested. This case is distinguished from *Staples v. State*, 89 Tenn., 231, and *Swayne v. State*, MS., Jackson, 1890, in that the language complained of was unexpected to at the time.

Counsel for the defendant, after the argument of the case had been completed, requested the following instructions relative to certain remarks of the Attorney-general, made in his closing speech to the jury, viz.:

"1. It is the duty of the jury to decide the case solely on the law as given you by the Court and the evidence as given you by the witnesses. Counsel for the prosecution and defense are permitted to address you in favor of their respective sides, but denunciation of the defendant or witnesses in language of bitterness or passion should not be regarded by you, nor influence your verdict. Nor should you regard that part of the Attorney-general's speech, when addressing you, in which he told you that the wife of the defendant was made to apologize to Mrs. Pillow, because there was no evidence of such apology; nor that part in which he tells you of the Parker Harris case, and the Brenish case, as it is for you to decide this case



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on the evidence in it alone, and not upon what other juries may have done in other cases, the facts of which are not reported in the books and not in evidence before you.

"2. At the further request of defendant, I further instruct you that you should not regard the Attorney-general's statement, in argument, that, at the time of the homicide, 'defendant was behind the post, if the truth was known,' as there is no evidence to show that defendant was so concealed. Nor should you regard the fact, stated by the Attorney-general in argument, that 'the defendant told the newspaper reporters, after the homicide, that he had no statement to make,' because the Court excluded this evidence, and it is not, therefore, before you for consideration at all."

There was no error in refusing these requests as they were framed. The first was clearly objectionable, because not specific in its reference to the language of "bitterness and passion." It pointed out nothing, and was intended as a sweeping criticism of an argument not objected to when made, and sought to be weakened by a general observation. The jury had been fully instructed that they must try the case upon the sworn testimony alone, and without bias or prejudice. If any further instructions were proper to insure such a consideration of the case, the instructions should have been so framed as to point out the particular evil to be guarded against. The instruction was objectionable upon another ground. It embraced a state-

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ment to the jury that there was no evidence to support a particular argument made by the Attorney-general, when the record shows that there was evidence tending to justify the contention of that officer. The Court cannot be put in error for refusing a request which embraces both proper and improper matter. The second request was properly refused. There was evidence tending to support the argument sought to be eliminated.

*Seventh.*—The motion for a new trial, based upon newly-discovered evidence tending to support the defense of insanity, was properly overruled. The evidence was cumulative, and no sufficient diligence is shown in the effort to get the testimony for which a new trial was asked. Besides, it seems to us, upon a careful consideration of the whole evidence, that a new trial for the purpose of submitting the evidence newly discovered could be of no possible advantage. That in the record, added to that discovered, it seems to us, could not together engender a doubt of the legal responsibility of the defendant, judging him by his own evidence as a witness concerning his conduct and actions on the day and at the moment of the killing of deceased.

*Eighth.*—The charge is full, and free from any error of which defendant can complain. Detached sentences have been pointed out as erroneous. These sentences, where taken in connection with their context, are unobjectionable. Some criticism has been urged against a clause wherein the Court

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told the jury that the premeditation necessary to constitute murder in the first degree "draws with it the necessity of express malice toward the victim on the part of the assailant;" because, said His Honor, "it would be impossible, in the nature of things, for premeditation to exist toward an individual without, at the same time, having toward that individual the express evil intent constituting express malice." This is substantially repeated where the Court said: "If you are satisfied from the proof that defendant premeditated the death of the deceased, David H. Poston, this ingredient of murder in the first degree would naturally draw with it the necessity of express malice towards the deceased on the part of the defendant. This is evidenced," adds the Court, "should it appear that the defendant, with a sedate and deliberate mind and formed design towards the deceased, killed him; which formed design may be inferred from external circumstances disclosing the inward intention—such as lying in wait, antecedent thoughts, former grudges, and concerted schemes to do the deceased some bodily harm."

The Court had previously instructed fully as to the necessity of deliberation and malice. He had defined premeditation. He was considering murder in the first degree alone in this part of his charge. Subsequently he told the jury of the effect in reducing the degree of crime, which would result from the presence of provocation or passion. The suggestion that a man in self-defense may pre-

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meditate the killing of his adversary, and that, therefore, malice is not presumed or inferred from premeditation, is fully met when the Court came to charge upon the subject of self-defense. The charge on the subject of insanity is in accord with *Stewart v. State*, 1 Bax., 178.

On the burden of proof concerning insanity the Court said: "The material question for your consideration is, Was the act of killing, as charged in this case, the deliberate act of a sane man? The law presumes that every man is sane until the contrary is proved, and when insanity is set up as a defense to any criminal charge, the burden of proof is upon the party alleging it. The Court, however, charges you that if from all the proof in the case you have a reasonable doubt as to whether the defendant was sane at the time he committed the act charged, he is entitled to the benefit of the doubt, and in that event your verdict will be not guilty."

In the leading case of *Dove v. State*, this Court said: "It may be safely stated that no person can be guilty of murder who has not sufficient discretion or discernment to distinguish between good and evil, and who has no consciousness of doing wrong. The law presumes every person to have this sound memory and discretion. Therefore, when the defendant was put upon his trial for murder, it was not necessary for the State to adduce proof of his sanity. The presumption of law stood for and supplied the proof. If he relied

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on the defense of insanity, the burden of proof was upon him to show that he was not of sound memory and discretion, unless the proof of the State showed that he was not of sound memory and discretion."

Again the Court said: "But suppose the proof in the cause makes an uneven balance in the minds of the jury whether the defendant was sane or insane; how, in that state of doubt, could the jury find that the defendant did the killing willfully, deliberately, maliciously, and premeditatedly? They are in doubt about his being of sound memory and discretion. \* \* \* The presumption of sanity stands for sufficient proof of sanity until the presumption is overturned. When the proof of insanity makes an *equipoise*, the presumption of sanity is neutralized; it is overturned; it ceases to weigh, and the jury are in reasonable doubt." 3 Heis., 370, 371.

The charge was fully as favorable as the defendant was entitled to. Upon the general subject of insanity, the charge, as we have elsewhere stated, was in accord with our decisions, and there was no error in refusing the additional charge asked for.

*Ninth.*—A motion in arrest of judgment was entered and overruled. The motion was in these words: "Comes the defendant and moves the Court in arrest of judgment on the verdict of conviction rendered against him on July 3, 1891; and for grounds of motion states that, on Thurs-

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day, July 2, 1891, the afternoon, the Sheriff of the county announced in open Court that the Criminal Court of Shelby County was adjourned until Monday, July 6, 1891, at half-past eight o'clock in the morning of said day. The Court was not, thereupon, lawfully in session on Friday, July 3, 1891, at the time the verdict was rendered and received against defendant."

The minutes of the Court did not support this motion. By the record, it appeared that the adjournment on the second of July was to the third of July, and the same record showed the Court in session on the third, pursuant to the adjournment, and the return of the jury into Court on that day with the verdict. A motion in arrest of judgment must be rested upon that which appears of record, and evidence *aliunde* is not admissible upon such a motion. *State v. Allison*, 3 Yer., 428; *State v. Rogers*, 6 Bax., 563.

The motion was therefore properly overruled. But if it be considered as a motion to correct the record, supported by affidavit that the Sheriff did announce an adjournment to July 6, then it is equally unavailing. The announcement by the Sheriff did not conclude the Court from having the minutes show an adjournment to a different time. Whether the Sheriff made a mistake or the Judge retracted the order is equally unimportant. The record, as made up by the Judge, and as signed by him, is conclusive of the fact that the adjournment was to July 3, and the record of that day shows the

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Court in session, and this, as well as other business, to have been transacted.

*Tenth.*—There was no error in the admission of the dying declaration made by the deceased. The evidence clearly shows that it was made in the belief that death was certain and impending. It was reduced to writing at his dictation, and signed by the declarant. The writing contained the only declaration made, and it was properly admitted as the best evidence of what his declarations had been. It was in these words: "I was walking down Main Street, just in front of Byrd's old stand. I saw H. Clay King approaching me, I thought with intention of speaking to me. He walked up in front of me, and told me I was a d—d s—n of a b—h. He pulled a pistol and fired, pushing it right at my body. No conversation had occurred between us at all. I made no effort to resent what he said; he shot me in an instant."

The defendant, after stating that he met deceased accidentally, and that, in standing on the side of the street in front of a cigar-store, he had no desire or expectation of meeting deceased, said, when examined as a witness for himself: "Mr. Poston came along. When Mr. Poston got opposite me, he looked at me and I looked at him, and I asked Mr. Poston to withdraw the charges that he had made against my wife and myself in a cross-bill in a suit in Arkansas—*King v. Pillow*. Mr. Poston said he wouldn't do it. I then said, 'Mr. Poston, you are a scoundrel.' Mr. Poston there-

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upon denounced me. He says, 'You are a liar, a scoundrel, and a s—n of a b—h.' That was in front of Lee's store. I backed down in front of that alley, and I told Mr. Poston to stand back. His hands were in his overcoat, or coat, or whatever it was. I then drew my pistol and gave him one shot, and he retreated. I could have given him five more, but I only gave him one to repel the assault. That is what occurred.

"*Ques.* What you did was in response to the demonstration that he made with his hands, either under his overcoat or back against his hip?

"*Ans.* I don't know whether his hand was under his hip. It was under his overcoat. I couldn't tell whether it went back or into his pocket. It went under his overcoat.

"*Ques.* From his manner and demonstration, what did you understand was his purpose?

"*Ans.* Why, he was advancing upon me. Of course, I supposed that he was armed either with a knife or a pistol or some other weapon; but he was advancing, and I told him to stand back. I was in the alley. It was done quickly. He came up within three feet of me. I had backed into the mouth of the alley."

The conflict between defendant's testimony in his own behalf, and the dying declarations of the deceased was irreconcilable. The Court gave defendant a charge more favorable than he could rightly have demanded, in telling the jury that if they believed the facts to be as stated by defend-



ant that they should acquit him. The by-standers who saw and heard what passed, were examined. The overwhelming weight of their evidence was that no colloquy whatever occurred, and that the deceased made no such demonstration as described by defendant.

The fact that a grudge existed between the parties, and that defendant bore great ill will to deceased, is not disputed. The weight of the evidence strongly shows that defendant did not meet deceased accidentally; but that he had been looking for him, and had crossed the street to intercept him when he observed his approach. He was observed by several witnesses, just before the approach of Mr. Poston, to be standing in the attitude of one watching. He had on an overcoat with a side-pocket. In this he had his right-hand, grasping the partly-disclosed handle of an improved, self-cocking revolver of heavy caliber. The weight of evidence clearly shows a deliberate and premeditated purpose to kill deceased on sight. The verdict is well supported. The defendant was entitled to a full, patient, and impartial trial. This he has had by a jury of his own selection. Upon his appeal the record has been laboriously re-examined. No doubt exists as to the righteousness and justice of the judgment from which he has appealed.

The defendant stands condemned by that law at whose altar he has so long stood as a ministering priest. The decrees of that law, to be respected,

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must be impartial, for all are within its compass; "the very least as feeling its care, and the very greatest as not exempted from its power."

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## DISSENTING OPINION.

SNODGRASS, J. I cannot concur in the conclusion reached on the question of communications with the jury. I understand the rule to be, that where a communication is shown to have been made to a jurymen, it devolves upon the State the *onus* of showing clearly that it was not prejudicial to defendant. The law does not undertake to determine how injurious influences may be transmitted from without, or assume that it may not be done through relatives and families of jurymen. It forbids them all, and when it appears that a communication of any kind has been allowed, the establishment of the fact makes it unlawful, however innocent. Whatever may be its nature, it is not merely presumed to be, it *is* unlawful; but if in fact it is explained as innocent in its nature, and not prejudicial to defendant, the reception of such communication is not reversible error. Here written and oral communications of families and relatives are proven. In explanation, it is not only not proven what certain of these communications were, but it is not even said by the officers who had charge

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of the jury, in their testimony on this point, taken on the motion for a new trial, that they were not about this case; nor even the opinion expressed that they were not prejudicial to defendant.

The view that this is technical is true. It is technical in one sense, that a jury must be kept separate and apart from others, and not be communicated with, and in another it is technical that defendant is entitled to a trial at all; but the communications which are forbidden, when unexplained, can never be other than material, unless we change the rule, and presume them all lawful and harmless until the contrary appears.

Like all other rules of law, it must have a statement in terms. This is its formula and expression; if it be the "husk of a technicality," as indicated by the majority, it is only unfortunate in present characterization. The rule remains sound, however, as an essential requisite to secure the most inestimable right of the citizen—that of a fair trial.

Entertaining this view, I think a new trial should be granted.

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Rafferty v. State.

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## \*RAFFERTY v. STATE.

(Jackson. April Term, 1891.)

1. CRIMINAL LAW. *Attempts. False pretenses.*

By statute the attempt to commit any felony is made a felony. Obtaining money under false pretenses is a felony, and the attempt to commit this offense is likewise a felony.

Code construed: §§ 5379, 5468, 5472 (M. & V.); §§ 4630, 4701, 4705 (T. & S.).

Cases cited and approved: DeLacy v. State, 8 Bax., 402; Hayes v. State, 15 Lea, 66, 67; Clark v. State, 86 Tenn., 511.

Cited as overruled: Nicholson v. State, 9 Bax., 258; Marks v. Borum, 1 Bax., 94; State v. Montgomery, 7 Bax., 161.

2. FALSE PRETENSES. *Attempt to obtain money by, what is sufficient.*

A person has committed the crime of attempting to obtain money by false pretenses, who, having taken out insurance upon certain personal property belonging to him, afterwards attempts to obtain payment of the policy upon the false representation that the property had been destroyed by fire, made, with full knowledge of the untruthfulness of the representation, for the purpose of defrauding the insurer—the assured presenting proofs of loss known to be false, and at the same time having the property represented to have been lost, in his possession or under his control, and fraudulently concealing the fact of its existence.

3. SAME. *Same. Competent proof of.*

And the preliminary proofs of loss furnished by the insured to the insurer, and the written statements made by the insured to the insurer's examiner or adjuster in regard to the loss, are competent evidence against the defendant in such case.

4. SAME. *Same. Same.*

It is also competent for the State to show, in such case, that many of the articles claimed by the insured to have been destroyed by fire were

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\* Omitted by inadvertence from last volume.—REPORTER.

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'subsequently found in his trunk and valise, in his possession or under his control.

5. SAME. *Same. Same.*

It is also competent for the State to prove, in such case, the statements made by defendant on his examination in his own behalf on a former mistrial of the case, to the effect that he had had thirteen different fires, in as many different cities, within a period of about three years, and under different names; there being other evidence to show that in many of the instances insured had policy, and collected insurance, for the same articles claimed to have been destroyed in this case.

Cases cited and approved: *Britt v. State*, 9 Hum., 30; *Defrese v. State*, 3 Heis., 53; *Link v. State*, 13 Lea, 701; *Foute v. State*, 15 Lea, 712.

6. EVIDENCE. *Sufficient of existence of foreign insurance company in criminal case.*

Upon trial of a criminal case in which defendant is charged with attempting to obtain money of a foreign insurance company by false pretenses, the certificate of the State Insurance Commissioner to the effect that such company has in all things complied with the laws of this State, and that it is authorized to do business in the State, is admissible on behalf of State, and affords *prima facie* evidence that such company is incorporated.

Code construed: §§ 2575, 2576 (M. & V.).

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FROM SHELBY.

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Appeal in error from Criminal Court of Shelby County. J. J. DUBOSE, J.

G. P. M. TURNER for Rafferty.

Attorney-general PICKLE for State.

CALDWELL, J. Mrs. Belle Rafferty, the plaintiff in error, is under sentence of two years' imprisonment in the penitentiary for a certain alleged attempt to obtain money under false and fraudulent pretenses.

Several reasons have been assigned for reversal:

*First.*—It is urged in behalf of the prisoner that no such offense as a mere *attempt* to obtain money under false and fraudulent pretenses is known to our law; and that, if there be such an offense, it is at most only a misdemeanor, and not a felony.

All violations of law punishable by imprisonment in the penitentiary or by the infliction of the death penalty are felonies; and all violations of law punishable by fine or imprisonment in the county jail are misdemeanors. Code (M. & V.), § 6051.

Every false and fraudulent pretense whereby one person obtains the money or other personal property of another, is punishable by imprisonment in the penitentiary (Code, §§ 5468 and 5472), and is, therefore, a felony.

An *attempt* to commit *any felony* is punishable by imprisonment in the penitentiary, or by fine and imprisonment in the county jail, at the election of the jury, unless the punishment be otherwise prescribed by law. Code, § 5379.

The *obtaining of* money or other personal property by false and fraudulent pretense being a felony, and the punishment for an *attempt* to commit that

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offense not being otherwise prescribed (as it is not), it follows that such *attempt* is punishable by imprisonment in the penitentiary, and is, therefore, a felony, and not a misdemeanor.

The fact that the punishment for the attempt is in the alternative, either by imprisonment in the penitentiary or by fine and imprisonment in the county jail, does not make it any less an offense punishable by imprisonment in the penitentiary, or take from it the characteristic of a felony.

It is not necessary that the attempts contemplated by § 5379 of the Code should be coupled with a personal assault. It is sufficient, to constitute the offense, if the offender either assault another with intent to commit, or *otherwise attempt to commit* any felony. The language of the statute is as follows: "If any person assault another with intent to commit, or *otherwise attempt to commit* any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not more than one year, and by fine not exceeding five hundred dollars, at the discretion of the jury." Code, § 5379.

In *Jones v. The State*, MS., December Term, 1871, and in *Nicholson v. The State*, 9 Bax., 258, this Court held (in accordance with the present contention of counsel for plaintiff in error), that the foregoing statute contemplated only such of-

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fenses as were coupled with an assault on the person, and did not include a simple *attempt* to commit the crime of larceny. The former of these cases was cited and approved by the Court in *Marks v. Borum*, 1 Bax., 94, and *State v. Montgomery*, 7 Bax., 161. But in *DeLacy v. The State*, 8 Bax., 402, a contrary construction was suggested as the proper one to be given the statute. All of these cases were reviewed in *Hayes v. The State*, 15 Lea, 66 and 67; the construction suggested in DeLacy's case being approved and applied, and the earlier construction being disapproved, and the case of *Jones v. The State* overruled expressly, Special Judge S. F. Wilson delivering the opinion of the Court.

*Hayes v. The State* was approved and followed in the late case of *Clark v. The State*, 2 Pickle, 511, wherein it was decided that one who feloniously opened the cash-drawer of another, believing it to contain money or other valuables, and intending to steal the same, was guilty of an *attempt* to commit larceny, and punishable as for a felony, though the drawer proved to be entirely empty.

*Second.*—Prior to the commencement of this prosecution, Mrs. Rafferty, in person, procured a policy of insurance against loss by fire from an agent of the London and Lancashire Fire Insurance Company, covering her household furniture, wearing apparel, jewelry, books, etc., to the amount of \$1,250, said to be contained in a certain framed



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building, in the city of Memphis, occupied by her as a family residence.

Seventeen days after the issuance of the policy, and during its life, the building was totally destroyed by fire. Promptly thereafter she personally gave written notice to the agent of the insurance company, and filed itemized proofs of loss, verified by her affidavit as required by the rules of the company, wherein she claimed that she had lost by the fire substantially all the property covered by the policy, to the value of about \$1,900; and thereupon she demanded of the company payment of \$1,250, the full amount covered by the policy.

In response to the notification of the company, she also appeared before an insurance examiner and deposed that she owned the property set out in her proofs of loss, that it was contained in the building covered by the policy, and destroyed by the fire.

Having complied with all the requirements of the policy, and taken all formal steps necessary to entitle her to the full sum of \$1,250, if the loss and her claim of value were *bona fide*, and the company still refusing to settle or make payment, she filed her bill in the Chancery Court, three months and a half after the occurrence of the fire, against the insurance company, to compel it to indemnify her according to its undertaking in the policy.

Soon after the filing of that bill, which is still pending, this prosecution was begun.

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It is charged in the indictment in several distinct counts, and in as many different forms of expression, in substance, as follows: That Mrs. Belle Rafferty, with intent to defraud said insurance company, falsely and feloniously prepared and presented to it formal proofs of loss, enumerating therein various articles of wearing apparel and other personal property covered by said policy, which articles she falsely, fraudulently, and feloniously pretended and represented had been destroyed by said fire; that she then and there falsely and fraudulently, with intent to defraud said insurance company, claimed that she was entitled to be paid for said property so represented to have been destroyed, and demanded full payment of the face value of said policy, when she well knew that all of her said proofs, representations, and pretenses were false, felonious, and fraudulent; that, in truth and in fact, the said articles of property, or the most of them, covered by said policy, and by her pretended and represented to have been destroyed by the fire aforesaid, were not burnt and destroyed at all, but had been by her removed from the building before the fire occurred, with the view and for the purpose of defrauding the insurance company; that she did not, in reality, sustain the loss, and was not damaged as she had claimed and represented, and, as she well knew, was not entitled to collect her said policy; and that by her said several false and fraudulent acts, statements, and representations as aforesaid,

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she was guilty of attempting to obtain money (in amount \$1,250) by false and fraudulent pretenses.

To sustain this charge the State presented a great deal of evidence. Among other things, it introduced the proofs of loss presented, and written statements made by Mrs. Rafferty in her deposition before the insurance examiner. Objection was made in the Court below, and it is here insisted, that these papers were incompetent, and should have been excluded. •

The evidence was entirely competent. It reflected directly on the offense charged in the indictment. In fact, the charge could not have been made out at all without showing what steps the defendant had taken toward the collection of her insurance policy. What she had done looking to that end being, in fact and by the rules of the company, reduced to writing, the written papers themselves were the best, if not the only, evidence that could have been produced to show what representations she had made to the company, and what demands she had made under her policy. That the effect was to use the defendant's own statements in a civil proceeding against her in a criminal action, and that, too, against her will, did not render the evidence incompetent. The very crime imputed to her necessarily involved her acts and statements relative to the matter in which she was engaged. Her representations formed a material part of the offense charged, and, as such, must have been proved to show her *status* before

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the law, and make out the case. To reject such evidence would be to hold that the charge could not be established at all, and to nullify the statute.

*Third.*—Some time after the fire a valise and a trunk, belonging to the defendant, were found by persons investigating the case, the former at the hotel where she was stopping, and the latter at a pawnbroker's shop in the city of Memphis, where she had deposited it in an assumed name, before the fire occurred.

The valise and trunk contained many of the articles of wearing apparel, etc., to the value of several hundred dollars, which she had minutely described and enumerated in her proofs of loss, schedule, and deposition as destroyed by the fire. These and other like incriminating facts were proven before the jury.

They had caused the insurance company to investigate her history prior to her location in Memphis, only a few weeks before the fire here in question. That history will appear, in part, from statements hereafter made in this opinion.

Mrs. Rafferty has been twice tried on this indictment. First there was a mistrial, and then the present conviction. On the first trial, while on the witness-stand, testifying in her own behalf, she admitted, on cross-examination, that she had had thirteen different fires, in as many different cities, within a period of about three years, and under different names.

On the second trial she did not testify, but the

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State was allowed to prove her admission made on the first trial. The places at which she had the different fires, and the various names, under which she was known at each place, are, by her own admission, as follows:

Wichita, Kansas, Mrs. Sue Rafferty; Pueblo, Col., Mrs. S. Rafferty; Nashville, Tenn., Miss Agnes Henry; Cincinnati, Ohio, Mrs. B. McDonald; St. Louis, Mo., Emma Curtis; Dallas, Texas, Mrs. Goodman; Fort Worth, Texas, Belle Woodson; San Antonio, Texas, Mrs. S. B. Ross; Galveston, Texas, Mrs. B. Ross; Denver, Col., Mrs. Belle Robinson; Kansas City, Mo., Mrs. Rafferty; Sedalia, Mo., Mrs. Thomas Lane; Memphis, Tenn., Mrs. Belle Rafferty.

The State was also allowed, over the objection of defendant, to introduce as evidence written documents showing that defendant had been insured at many of said places, and had made proofs of loss and schedule of property, and received insurance money in full in some instances, and in part, by compromise, in others; and that the articles enumerated and represented as destroyed in each case were largely the same as those enumerated and represented as destroyed in this case.

It is now insisted for defendant that all of this proof was incompetent; that it greatly prejudiced her case before the jury; and that she should be awarded a new trial on account thereof.

1. As a general rule, evidence of distinct antecedent acts or transactions is to be rejected as

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Rafferty v. State.

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altogether inadmissible against a person on trial for a particular offense; but where the offense is consummated by a trick, a fraud, or a system of acts or representations, such antecedent acts or transactions are admissible to establish unlawful intent or bring guilty knowledge home to the defendant in the particular case. *Britt v. The State*, 9 Hum., 30; *Defrese v. The State*, 3 Heis., 53; *Links v. The State*, 13 Lea, 701; *Foute v. The State*, 15 Lea, 712; Wharton's Crim. Evi. (9th Ed.), Secs. 34 and 53.

Where a defendant is charged with firing a house to defraud the insurers, it has been held admissible for the prosecution to prove that on prior occasions houses occupied by the defendant had been burned, and that he obtained payment for same from separate companies. Wharton's Crim. Evi. (9th Ed.), Sec. 36, and cases cited. The evidence objected to was competent for the purpose we have indicated above. The learned Criminal Judge expressly limited it to such purpose, both when it was introduced and again in his final charge to the jury. Hence, there was no error in its admission.

2. It is true that there was no power to compel the defendant to testify against herself; but, having voluntarily gone on the witness-stand in her own behalf on the former trial, and there made statements against her interest, it was entirely competent for the State, on the second trial, to prove those statements as admissions voluntarily made.

Admissions made under such circumstances may be proven in the same manner and for the same reasons that admissions made out of Court may be proven.

*Fourth.*—The State produced in evidence what purported to be a certified pamphlet copy of the charter of incorporation of the London and Lancashire Fire Insurance Company, of Liverpool, England, that being the company in which defendant had her policy, and from which it was charged that she had attempted to obtain money under false and fraudulent pretenses.

Objection was urged by the defendant's counsel against the admission of this pamphlet, upon the alleged ground that it was not formally authenticated as required by law. It is now contended that the Court erred in overruling the objection and admitting the pamphlet as offered.

Whether the authentication is sufficient to authorize said company to bring and maintain a civil action in the Courts of this State as a foreign corporation is immaterial, and need not be decided in this case.

The certificate of the Insurance Commissioner of Tennessee, to the effect that said company had in all thing complied with the laws of this State, and that it was authorized to transact business at Memphis, was *prima facie* evidence that it was an incorporated company. This certificate was attached to and introduced in evidence with the alleged charter. For the purposes of this prose-

cution, or any action against the company by one of its policy-holders, no further authentication than this certificate can be required. The certificate was the company's authority for doing business in this State (Code, §§ 2575, 2576), and, having acted thereunder, the company would not be heard to deny its incorporation in fact, and thereby avoid liability to the defendant or any other patron.

The objection is not well taken.

*Lastly.*—The verdict of the jury is abundantly sustained by the evidence. In addition to those recited in this opinion, the record discloses many incriminating facts and circumstances against the defendant.

Let the judgment be /affirmed/





CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF TENNESSEE,  
FOR THE  
EASTERN DIVISION.

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KNOXVILLE, SEPTEMBER TERM, 1892.

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HURFORD *v.* STATE.

(*Knoxville*. September 20, 1892.)

TAXATION. *Privilege tax on sample-sellers invalid as regulation of interstate commerce.*

Revenue Act (1891) imposing privilege tax on persons selling goods to consumers by sample, and declaring it a misdemeanor to do so without payment of this tax, is invalid, as an unlawful regulation of interstate commerce, in so far as it shall be applied to persons, not residents of the State, who, as agents or drummers, take orders in this State from consumers for sale of the goods of their non-resident principal situated outside the State—the orders to be sent to such

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Hurford v. State.

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non-resident seller, and the goods forwarded by him, in compliance with their terms, to the buyer.

Act construed: Acts 1891, Ch. 25, pp. 65, 74 (Extra Session).

Case cited and approved: 120 U. S., 489.

Cited and distinguished: 145 U. S.

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FROM BRADLEY.

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Appeal in error from Circuit Court of Bradley County. ARTHUR TRAYNOR, J.

WHITE & MARTIN for Hurford.

Attorney-general PICKLE for State.

LURTON, J. Hurford has been indicted and convicted of a misdemeanor in selling goods by sample to consumers without first taking out the license and paying the privilege tax required by the Revenue Acts of 1891.

He has appealed, and the facts are set out in an agreed statement, from which we quote:

"The defendant, E. B. Hurford, is a citizen and resident of Canton, Ohio, and on May 2, 1892, was engaged in the business of drumming in the city of Cleveland, Tennessee; that is, he was soliciting trade, by the use of samples, for the firm for which he worked as a drummer—said firm being the firm known as the Novelty Cutlery Company,

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doing business in Canton, Ohio—all the members of said firm being citizens and residents of Canton, Ohio. The goods which he was selling by sample were what was known as "Novelty Pocket-knives," being a knife with a transparent handle, on which can be placed a photograph or name of owner, if desired. The article is a patented article, manufactured solely by the Novelty Cutlery Company, which is the owner of the patent-right.

"Defendant Hurford was selling the knives or goods directly to the consumers, and all sales were made by sample. All orders were taken in writing. \* \* \* The goods are manufactured by the Novelty Cutlery Company, in Ohio. After the company has received the order, and the articles are manufactured to fill the order, they are shipped, either by mail, registered letter, or by express, or delivered by the agent in person. In some instances, sales are made on time, but this is only in cases where the purchaser buys a large quantity, and is a good, solvent party. In other cases, the order is taken for cash on delivery, and in such cases the goods are sent to him C. O. D., or are carried directly to the purchaser by an agent of the company, who collects the money and delivers the goods simultaneously. All contracts of sales made in Cleveland, Tennessee, were made on the latter plan, though no knives had actually been delivered on the orders taken, in Cleveland, defendant having, up to the time of his arrest, been only engaged in soliciting orders. \* \* \* Defendant always stated to

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Hurford v. State.

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purchasers that if the goods were not up to the samples, or were not what was ordered, they would not be required to take them. Defendant had not taken out any license or paid any privilege tax, as required by law."

By the Revenue Acts passed at the extra session of 1891, the occupation of "*sample-sellers and solicitors*" was made a privilege, and all persons "selling goods, wares, chattels, or any other character of merchandise to consumers by sample, or taking orders or measures from consumers," were required to take out a license and pay an annual tax, for the privilege, of ten dollars in each county in which business was done. By the same Act, it was made a misdemeanor to exercise any privilege mentioned in the Act without paying the tax and taking out license.

In all its substantial particulars, this case is identical with *Robbins v. Taxing District*, 13 Lea, 303. This Court then held that the tax on drummers was not a regulation of commerce between the States, although the agent was a non-resident, who sold, by sample, goods without the State for non-resident principals, and was not, therefore, obnoxious to that clause of the Constitution of the United States which declares that Congress shall have power to regulate commerce between the States. Upon a writ of error to the Supreme Court of the United States, our judgment was reversed and the Act imposing the privilege tax held to be obnoxious to the interstate commerce clause

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Hurford v. State.

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of the Federal Constitution, in so far as it was sought to apply it to the non-resident agent of non-resident principals, who sold, by sample, goods not within the State at the time of sale. *Robbins v. Taxing District*, 120 U. S., 489.

It is of no substantial importance, under that decision, whether the drummer negotiates a sale with a dealer or a consumer, and it is equally unimportant as to how the delivery is to be made. If the order is sent out of the State, and the goods afterwards sent into the State to fill it, it is immaterial whether delivery to the buyer is to be by a carrier, a postmaster, or by an agent of the seller, to whom they are sent for delivery in pursuance of a sale previously negotiated while the goods were without the State. The view of this Court was that such a tax was imposed on the occupation of drumming, and, if it did not discriminate between residents and non-residents, that it was not a regulation of interstate commerce. These views did not meet the indorsement of the Supreme Court of the United States. That Court, with reference to questions arising upon the Constitution of the United States, is the Court of last resort. It is our duty, with respect to such questions, to conform our judgments, where a Federal question arises, to the opinions of that Court. We are, therefore, constrained to hold, in the language of that Court, that "the negotiation of sales of goods, which are in another State, for the purpose of introducing them into the State in

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which the negotiation is made, is interstate commerce," and that a tax upon an agent exclusively engaged in making such sales is a tax upon interstate commerce, and obnoxious to the Constitution of the United States.

The case of *Ficklin v. State*, 145 U. S., does not govern this case. The facts are altogether unlike. That case was thus stated in the opinion of Fuller, C. J.:

"In the case at bar the complainants were established, and did business, in the taxing district as general merchandise brokers, and were taxed, as such, under Section 9 of Chapter 96 of the Tennessee laws of 1881, which embraced a different subject-matter from Section 16 of that chapter. For the year 1887 they paid the fifty dollars tax charged, gave bond to report their gross commissions at the end of the year, and thereupon received, and, throughout the entire year, held a general and unrestricted license to do business as such brokers. They were thereby authorized to do any and all kinds of commission business, and became liable to pay the privilege tax in question, which was fixed in part, and in part graduated according to the amount of capital in the business, or, if no capital were invested, by the amount of commissions received. Although their principals happened, during 1887, as to the one party, to be wholly non-residents, and, as to the other, largely such, this fact might have been otherwise then and afterwards, as their business was not confined

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Hurford v. State.

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to transactions for non-residents. In the case of Robbins, the tax was held, in effect, not to be a tax on Robbins, but on his principals, while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom.

“No doubt can be entertained of the right of State Legislatures to tax trades, professions, and occupations, in the absence of inhibition in the State Constitution in that regard; and where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants of goods situated in another State, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution of the United States.”

In conclusion, that Court said: “We agree with the Supreme Court of the State that the complainants, having taken out licenses under the law in question, to do a general commission business, and having given bond to report their commissions during the year, and to pay the required percentage thereon, could not, when they applied for similar licenses for the ensuing year, resort to the Courts because the municipal authorities refused to issue such license without the payment of the stipulated tax.

“What position they would have occupied if they



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Hurford v. State.

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had not undertaken to do a general commission business, and had taken out no license therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record." 145 U. S.

In the case before us, Hurford is a non-resident, he did not undertake to do a general or special commission business, and the tax required from him depends upon a wholly different provision of the revenue law. He took out no license authorizing him to do a general drumming business, and he was solely engaged in selling, for non-resident principals, goods in another State. There is no similarity between this case and Ficklin's.

The Act imposing this tax is, therefore, in conflict with the Constitution of the United States, in so far as it has application to persons making sales of the character of those shown by this record.

Reverse the judgment.

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McKeldin v. Gouldy.

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## McKELDIN v. GOULDY.

(Knoxville. September 24, 1892.)

1. CHANCERY COURT. *Jurisdiction of, to aid creditor defined.*

Chancery Court has not jurisdiction to aid a creditor at large, holding a legal demand, to reach and subject to satisfaction of his claim an equitable interest owned by his debtor, and not leviable at law—there being no trust, fraud, or lien—when such interposition is sought alone upon the allegation of the debtor's insolvency, and that nothing can be made out of him at law.

Code construed: §§ 5026, 5031–5038 (M. & V.); §§ 4283, 4288–4295 (T. & S.).

Cases cited: Erwin v. Oldham, 6 Yer., 186; Ewing v. Cantrell, Meigs, 364; Jourolmon v. Massengill, 86 Tenn., 119; Porter v. Lea, 88 Tenn., 791; Chester v. Green, 5 Hum., 34; Hopkins v. Webb, 9 Hum., 522; McNairy v. Eastland, 10 Yer., 314; Montgomery v. McGhee, 7 Hum., 235; Embree v. Reeve, 6 Hum., 38; Turley v. Taylor, 3 Lea, 171; Peacock v. Tompkins, Meigs, 317; Brooks v. Gibson, 7 Lea, 274.

2. SAME. *Same.*

The creditor may, in such case, have decree for his debt, under the recent statute enlarging the jurisdiction of Chancery Courts. But any decree for sale of debtor's property for satisfaction of the creditors claim would be void—*coram non judice*.

Case cited and approved: 99 U. S., 398.

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FROM M'MINN.

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Appeal from Chancery Court of McMinn County.  
T. M. McCONNELL, Ch.

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McKeldin v. Gouldy.

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BURKETT, MANSFIELD &amp; TURLEY for McKeldin.

HARBISON &amp; ROBERTS for Gouldy.

LURTON, J. This is a bill in equity. The question presented is as to whether a Court of Equity has jurisdiction to aid a creditor at large, holding a legal demand, to reach and subject to the satisfaction of his claim an equitable interest not leviable at law—there being no trust, fraud, or lien—when such interposition is sought alone upon the allegation that the debtor is insolvent, and that nothing can be made out of him at law. The original jurisdiction of Courts of Equity, to aid a creditor holding a legal demand, was limited to those cases in which there was some element of fraud affecting the remedy at law as to assets subject to execution but for the interposition of fraud, and to those cases where there was some element of trust peculiarly entitling the creditor to subject a specific asset to the satisfaction of his demand; but where neither trust nor fraud appeared, such courts had no jurisdiction to aid such a creditor, even though he had exhausted his remedy at law. *Erwin v. Oldham*, 6 Yer., 186; *Ewing v. Cantrell*, Meigs, 364; *Jourolmon v. Massengill*, 86 Tenn., 119; *Porter v. Lea*, 88 Tenn., 791. To remedy this defect, our Act of 1832 was enacted. Its provisions now constitute §§ 5026 to 5030, inclusive, in the compilation of Milliken & Vertrees.

Under § 5026, the creditor whose execution had been returned unsatisfied, may file his bill in equity to compel the discovery of any property belonging to his debtor, including stocks, choses in action, or money due. Under the next section, the Court is given power to prevent the transfer, payment, or delivery of such property, and to subject same to the satisfaction of the creditor, whether such property was subject to execution or not. By § 5030 a remedy in equity is given:

1. In all cases where personal service of process cannot be made at law, and where no original attachment at law will lie, and no judgment at law can be obtained;

2. In cases where the demand is purely of an equitable nature.

The complainants are not judgment creditors. They are not, therefore, within the provisions of § 5026. Judgment at law could have been had. They are not, therefore, within § 5030.

By the Act of 1851-2, carried into the Code as §§ 5031 to 5038, both inclusive, Code of M. & V., a creditor without judgment may file his bill in equity to set aside fraudulent conveyances, and to subject the property to the satisfaction of his demand. Complainants do not allege any fraud, and they are, therefore, not within the provisions of this statute.

It is very obvious that the statutes enlarging the power of Courts of Equity to aid a creditor by subjecting to the satisfaction of his demand an

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McKeldin v. Gouldy.

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equitable interest, do not extend to a case where such creditor is not a judgment creditor, nor a creditor at large seeking to set aside a fraudulent conveyance, nor a creditor whose demand is secured by lien, nor a creditor asserting some character of trust in the property he seeks to appropriate. In equity no one was a creditor, or recognized as such, until he had first obtained a judgment at law or a decree in equity. *Chester v. Greer*, 5 Hum., 34; *Hopkins v. Webb*, 9 Hum., 522.

"The general rule is, therefore, that a judgment must be obtained, and certain steps taken toward enforcing or perfecting such judgment, before a person is entitled to institute a suit of this character." "In this rule," says Mr. Pomeroy, "there is uniformity of opinion, but the difficulty arises in determining exactly how far a plaintiff should proceed after he has obtained his judgment. It is, of course, necessary for him to allege and prove that he has taken the necessary steps at law before he can show a case requiring the interposition of equity." 3 Pom. Eq., Sec. 1415.

Our own cases illustrate the character of questions which have arisen concerning the steps, after judgment, necessary before he can resort to equity. *McNairy v. Eastland*, 10 Yer., 314; *Montgomery v. McGhee*, 7 Hum., 235; *Embree v. Reeves*, 6 Hum., 38; *Turley v. Taylor*, 3 Lea, 171.

The fact that the debtor is insolvent, and that nothing can be made out of him at law, is no reason for resort to equity. The mere poverty of

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McKeldin v. Gouldy.

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a debtor is no ground for taking jurisdiction in favor of a creditor at large.

When a proper creditor's bill is filed, either under the inherent powers of Courts of Equity, or under the extended powers of that court under the statute to aid a creditor, a lien exists from the filing of the bill, independent of statute. *Peacock v. Thompson*, Meigs, 317; *Brooks v. Gibson*, 7 Lea, 274. In consequence of this equitable lien, a decree subjecting the property upon which it rests, is within the power of the Court.

Here complainants acquired no lien by the filing of their bill, and none existed by reason of contract or otherwise. Hence a decree subjecting a particular asset to the satisfaction of complainant's demand would have been *coram non judice*. *Smith v. Railroad*, 99 U. S., 398.

The fact that complainants were sureties, and as such had paid the debt of defendant, affords no ground whatever for subjecting this equitable interest of their debtor. This interest was in no way affected by any trust, and had no connection with the demand of complainants. The fact that complainants obtained an injunction restraining the defendant from collecting or assigning the fund sought to be subjected, gave the Court no jurisdiction, by decree, to appropriate that fund to this debt. The fact of insolvency is no reason, by itself, for the issuance of an injunction restraining the debtor's use of his property. The decree dis-

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McKeldin v. Gouldy.

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charging the injunction on final hearing was proper. Gibson's Suits in Chancery, 788.

The jurisdiction of the Court to entertain the bill, conferred by our late statute, for the purpose of rendering judgment for the debt, is quite distinct from its jurisdiction to subject to the satisfaction of the judgment the equitable interest of the debtor pointed out in the bill. It had jurisdiction to grant a decree for the debt; it had none to grant the further relief sought.

The decree must be affirmed.

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 Watkins v. Clifton Hill Land Company.
 

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## WATKINS v. CLIFTON HILL LAND COMPANY.

91	683
117	515

(Knoxville. October 1, 1892.)

1. APPEAL BOND. *For costs only, sufficient, when.*

Under bill to enforce vendor's lien, the lands were sold, and their proceeds applied, leaving a balance due on the purchase-price notes. Decree was entered for this balance. The defendant appealed from this final decree, and all former decrees, giving appeal bond for costs only.

*Held:* Appeal was properly granted upon bond for costs only.

Code construed: §§ 3881, 3882 (M. & V.); § 3164 (T. & S.). (Acts, 1870-'71, Ch. 106.)

Cases cited: *Staub v. Williams*, 1 Lea, 36, 124; *Rogers v. Newman*, 5 Lea, 255; *Kinsey v. Staunton*, 6 Bax., 92; *Gibson v. Widener*, 85 Tenn., 16; *Younger v. Younger*, 90 Tenn., 25.

2. VENDOR'S LIEN. *Defenses not available to defeat its enforcement.*

In suit to enforce vendor's lien, the defense of fraud in the making of the sale is not available where it is not set up in the pleadings, and it appears that defendant is prosecuting an independent suit for rescission on that ground.

3. SAME. *What decree for sale should recite.*

Decree for sale of land, in suit for enforcement of vendor's lien, is sufficient without any formal decree for amount due, where it recites and adjudges the amount due on the notes given for the purchase-price, and orders the land to be sold if this ascertained sum is not paid in within a specified time.

4. SAME. *As to notes not due. Decree.*

Where land is decreed to be sold for payment of purchase-money notes, some of which are due and others not due, it is not essential that any of the deferred payments should fall due precisely at maturity of the notes not due at date of decree. The defendant cannot complain



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Watkins v. Clifton Hill Land Company.

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that a more liberal credit is given for his benefit than that provided by the statute.

Code construed: §§ 4306-4309 (M. & V.); §§ 3563-3566 (T. & S.).

5. SAME. *Same. Same.*

In suit to enforce vendor's lien for notes not due, the Court has not authority, after exhausting proceeds arising from sale of lands, leaving a balance of purchase-price unpaid, to enter decree upon a note not then due, although the defendant had not interposed any defense that suit had been prematurely brought as to such note.

Code construed: §§ 4306-4309 (M. & V.); §§ 3563-3566 (T. & S.).

6. SUPREME COURT. *Will not reverse for error, when.*

But this Court will not reverse the Chancellor's decree, erroneously giving decree upon such note, where it had fallen due, and complainant had become entitled to decree thereon before the date of the hearing in this Court.

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FROM HAMILTON.

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Appeal from Chancery Court of Hamilton County.  
T. M. McCONNELL, Chancellor.

WHITE & MARTIN, J. A. COLDWELL, and PICKLE  
& TURNER for Watkins.

COOKE, FRAZIER & SWANEY, WATKINS & BOGLE,  
ANDREWS & BARTON, and LEWIS SHEPHERD for Clif-  
ton Hill Land Company.

CALDWELL, J. On April 14, 1887, complainants,  
Mrs. Anna N. Watkins and Miss Alice M. Watkins,

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Watkins v. Clifton Hill Land Company.

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sold and conveyed to the defendant, Clifton Hill Land Company, one hundred and ninety acres of land, near Chattanooga, in consideration of \$125,000, of which \$35,000 were paid in cash, and the defendant's obligation to pay the balance was evidenced by its five promissory notes for \$18,000 each, maturing respectively on the first day of March, 1888, 1889, 1890, 1891, and 1892, and bearing interest from March 1, 1887, at the rate of 6 per cent. per annum, payable semi-annually. A specific lien was retained in the deed, and the defendant agreed in the face of its notes that it would pay reasonable attorney fees, if resort to law became necessary for their collection.

On April 9, 1889, the vendors filed the original bill in this cause, for the enforcement of their lien and collection of the said purchase-money notes by a sale of the land.

All of the notes were exhibited with the bill, two of them being past due at the time, and the other three yet to mature.

Amended and supplemental bills were subsequently filed. Defendant answered the three bills, and proof was taken on both sides.

On May 12, 1891, the Chancellor heard the cause, on pleadings and proof, and directed a sale of the land on a credit of six, twelve, eighteen, twenty-four, and thirty months, unless the amount then due complainant should be paid into Court within sixty days from the date of the decree.

In pursuance of that decree, the Clerk and Mas-

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Watkins v. Clifton Hill Land Company.

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ter sold the land, on August 5, 1891, to the complainant, at the price of \$47,000.

The sale was confirmed and title divested and vested on October 12, 1891. In the same decree the Court adjudged the defendant to be indebted to the complainant in the full aggregate amount of the five notes—although one of them had not yet matured—credited that sum by the net proceeds of the sale, and awarded execution for the balance. At a subsequent day of the same term, decree was rendered against the defendant for \$4,000, as reasonable compensation to solicitors of complainants. From that, and all four decrees in the cause, defendant appealed, upon a bond for costs only.

The first question for our consideration arises upon a motion of complainants to dismiss defendant's appeal. The ground of the motion is that the appeal bond is insufficient, being for costs only, and not for the unpaid part of the decree below (\$75,000), damages, and costs. The bond was executed under § 3882 of Code (M. & V.), which is as follows:

"In all cases in which, by the decree of any Court of Equity, real estate is ordered to be sold, and the party whose real estate is so decreed to be sold, prays and obtains an appeal to the Supreme Court, he shall be required to execute a bond in an amount sufficient to pay costs of the cause in the Court below and the Supreme Court." Whereas, complainants insist that bond should have

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been given as required by § 3881, which provides that "where decrees are for a specific sum of money, and against the party in his own right, the appeal bond shall be for the amount of the decree and damages and costs." Code, § 3881.

Section 3882 originated in the Act of 1870-71, Chapter 106, and was intended as an exception to § 3881, an old provision. The exception was created, as said by this Court in *Staub v. Williams*, 1 Lea, 124, to relieve the debtor of the obvious hardship of giving personal security for the decree against him, when by the same decree, or in the same cause, his land was adjudged to be sold in the enforcement of a vendor's lien or a mortgage; the land itself in such a case being deemed sufficient security for the debt.

Such having been the object of the exception, the case before us would, confessedly, have fallen within its operation, and a bond for costs would have been sufficient, had the appeal been obtained before the sale occurred, as it might have been under § 3874 of the Code, in the discretion of the Chancellor.

Does the fact that the appeal is prosecuted after the sale and application of proceeds, and after a large balance of indebtedness is adjudged to be due complainants, take the case out of the exception, and subject it to the original provision? We think not, clearly.

It is, after the sale as before, a case in which a Court of Equity has, by decree, ordered the

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sale of real estate for the enforcement of a vendor's lien; and the land is no more a sufficient security for the entire decree in the one instance than are its proceeds in the other.

This appeal is not alone from the adjudication of defendant's liability for \$75,000 after the exhaustion of its land—from a mere money decree for the balance of the debt—as assumed in argument for complainants. It is more than that. It is an unlimited appeal from all the decrees in the cause, and brings all of them before this Court for review; that adjudging defendant's liability and directing sale of the land, that confirming sale and applying proceeds, as well as that adjudging balance and awarding execution.

Primarily, the land is the subject-matter of the litigation; it is that about which the parties contracted, and out of which defendant's liability arose. Treating the land, upon the one side, as the representative of the debt; upon the other side, the Legislature manifestly intended that, in the given case, whether the appeal was before or after sale, the land, or its proceeds, should stand as security for the debt, and that bond should be required for costs alone.

It would minimize the statute, and in a large measure defeat its object, to limit its application to appeals before sale, as counsel for complainants suggest should be done, for such appeals are allowable only in the discretion of the Chancellor, and never as a matter of right. Code, §§ 3872, 3874;

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Watkins v. Clifton Hill Land Company.

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*Gibson v. Widener*, 85 Tenn., 16; *Younger v. Younger*, 90 Tenn., 25.

Section 3882 has been held to apply in case of decree to sell real estate for enforcement of a mechanic's lien (*Kinsey v. Stanton*, 6 Bax., 92), but not in cases where land is decreed to be sold under attachment for ordinary debt. *Staub v. Williams*, 1 Lea, 36; same case, on motion to rehear, 1 Lea, 123; *Rogers v. Newman*, 5 Lea, 255.

Motion to dismiss is not allowed.

Questions arising upon defendant's assignment of errors will next be considered.

*First.*—Defendant insists that complainants should have been repelled and their bill dismissed, on account of fraud, which it contends was perpetrated with reference to the price by complainants and its unfaithful agent in the sale of the land to defendant.

The merits of this question cannot be determined in this case, for two reasons: (1) because defendant interposes no such defense in its answers; and (2) because this record discloses the fact that there is now pending an independent suit, in which defendant seeks a rescission of the contract by reason of the facts here relied upon as evidence of fraud.

*Second.*—It is assigned as error that the land was ordered to be sold, and was sold, before a personal decree was rendered against the defendant on any of the purchase-money notes.

The decree assailed recited, in detail, the sale

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Watkins v. Clifton Hill Land Company.

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of the land and the execution of the several notes therefor, and then adjudged that none of the notes had been paid; that the land was bound for their payment; that four of them were overdue, giving the amount thereof, with interest; and, finally, that, unless the same should be paid into Court within sixty days, the Clerk and Master should sell the land, as a whole or in parcels, on the terms prescribed.

This decree was sufficient support and authority for the sale. It recites all material facts and makes all *necessary* adjudications. To the validity of the decree and sale thereunder, it was not essential that a pecuniary recovery should be had against the defendant in so many words, though such is the later practice in this State.

*Third.*—After the sale and confirmation, decree was rendered and execution awarded on the last of the five notes, before its maturity.

This is assigned as error; and so it was. It cannot be justified by the statute (Code, §§ 4306–4309), which, in a case like this, authorizes a sale by direction of the Court on such terms that deferred payments may fall due at such times as the purchase-money notes to the original vendor may mature.

The decree of sale here, though not literally so, was in substantial conformity to that statute, and was all that could be allowed at any time as to the immature note. It adjudged that four of the notes were due and that one of them was not due,

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and ordered a sale of the land on a credit of six, twelve, eighteen, twenty-four, and thirty months, which made two or three of the payments fall due even later than the maturity of the last note of the vendor. A sale on such terms was all that complainants were entitled to ask. The statute does not, in any case, contemplate or justify a personal recovery and award of execution upon a note not yet due.

The failure of defendant to plead in abatement does not preclude it from making the question now. The bills were not premature, though, when filed, some of the notes were not mature; for, under the statute, complainants had a right to sue upon all the notes, as they did, and to have the sale made as in the statute provided. Defendant waived nothing. The decree upon the last note, before maturity and award of execution for the money, was not within the scope of the bill, and defendant could not reasonably have anticipated that such relief would be sought under such a bill.

The error is manifest; but what is this Court now to do in the matter? Complainants would have been entitled to a decree on this last note had they waited only a few months longer. That time has now passed, and the note is several months overdue. In fact, no execution has actually issued. At most, defendant can only ask a reversal, and that the cause be remanded for further proceedings as to that note. It is clear from this



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record that another decree against defendant would follow, and that reversal would only result in delay and accumulation of additional costs. Instead, therefore, of reversing and remanding for another decree upon the same record, this Court may well affirm the decree already pronounced. Such a result is really to the advantage of the defendant, to the extent of the difference between common interest on the note and interest computed at semi-annual rests from the date of the decree already rendered until another one might be procured.

Complainants will not be heard to object to this, because they procured the decree merging the note and lessening the burden of interest.

Affirm the decree. Defendant will pay four-fifths and complainants one-fifth of the costs of this Court, and costs below will be paid as adjudged by the Chancellor.

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Pittsburg, etc., Mining Co. v. Quintrell.

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PITTSBURG, ETC., MINING CO. v. QUINTRELL.

(*Knoxville.* October 4, 1892.)

1. CORPORATIONS. *Contracts for, made before incorporation. Ratification.*

Contracts made on behalf of a corporation by its promoters, before it has a legal existence, do not bind the corporate body unless it adopts and ratifies such contracts after its incorporation has been perfected.

2. SAME. *Same. Same.*

The evidence of adoption by the corporation of a contract made on its behalf in advance of incorporation, is sufficient in this case to support the verdict of the jury holding the corporation liable thereon.

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FROM POLK.

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Appeal in error from the Circuit Court of Polk County. ARTHUR TRAYNOR, J.

GASTON & ROBESON and JAMES G. PARKS for Pittsburg, etc., Mining Co.

STUART & GAUT for Quintrell.

LURTON, J. This is an action for damages for breach of contract of hiring. There was a judgment in favor of the defendant in error.

Two errors have been assigned, both on the facts. At a former day of the term these assignments were overruled and the judgment of the Circuit Court affirmed.

A petition for rehearing has been filed, from which we quote the following:

"Petitioner shows that the assignment of errors and the argument of counsel presented several questions not pertinent to the controversy, and that the only question for consideration was the liability of petitioner *in any event*. Petitioner respectfully submits that the Court evidently overlooked the facts:

"1. That there is no proof in the record to show that the defendant company was in existence at the time the alleged contract was made, but, on the contrary, the proof shows that said company was not in existence.

"2. That there is no proof to show that the said company ever ratified any contract made by any party with the plaintiff.

"3. There is no proof to show that Shaffer, who made the contract with Quintrell, was an agent of the said company, but, on the contrary, the proof shows that he was not its agent."

Mr. Shaffer, the witness of defendant, shows that he, together with one Ferguson, owned a mining lease covering some copper mines; that they began the business of mining upon their property under the name and style of "The Pittsburg and Tennessee Copper Mining Company." How the lease was taken does not appear; nor is

it shown how long they did business under this style before taking out a charter. While thus engaged in business, and on or about May 20, 1891, according to the evidence of plaintiff below, Shaffer entered into the contract for the service of plaintiff, such service to begin, according to the evidence of Shaffer, in four or five days, and, according to plaintiff's evidence, so soon as he could reasonably get to the mines from Alabama after he had been communicated with. On May 24 the statutory application for incorporation of a mining company, under the name and style of "The Pittsburg and Tennessee Copper Mining Company," was duly made, and on that day signed by the proposed corporators. Two of these corporators were Shaffer and Ferguson, who had already been doing business under the same corporate title. There was some delay in the acknowledgment and registration of this application, but it seems to have been completed June 18. Inasmuch as this is not a suit against Shaffer and Ferguson as individuals or partners, there can be no judgment against them as doing business under the name and style of the Pittsburg and Tennessee Copper Company. While there can be no doubt that Shaffer intended to employ plaintiff for the proposed corporation, and to bind it by his contract when it should come into existence, yet it is very plain law that a corporation is not responsible for acts performed or contracts made, before it came into existence, by promoters or persons proposing

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to bind the company when it should be organized. A corporation not in existence can have no agent. The law of agency implies a principal capable of being represented by an agent of his own appointment. It follows, therefore, that Shaffer could not have been the agent of this corporation when he made this contract, whether he made it on the tenth or on the twentieth of May. Morawetz on Corporations, and cases cited by him to Sec. 547. But the law is equally as well settled that a contract made in advance of incorporation may be adopted after organization, and thereby become the contract of the corporation. The liability, in case of adoption, does not rest upon the idea of any supposed agency of the promoters, "but upon the immediate and voluntary act of the company." Morawetz, Sec. 548.

It was upon the evidences of adoption found in the record that we rested our affirmance of this judgment. Some of these evidences were: (1) That after the application had been made for a charter, Shaffer sent word to the father of the plaintiff that he must report for work by the next Monday. (2) When Quintrell reached the mines he states that Shaffer told him that another had been put at the job intended for his superintendence, but that another shaft would be shortly started, and he would be wanted to superintend its construction. He could have gotten work elsewhere, but, being told this, and being also requested to report at the mines as often as three or four times

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a week, he sought no other work, and waited the arrival of the new manager, who was to locate the new shaft. (3) Quintrell, while thus awaiting assignment to duty, saw Mr. Ferguson, formerly connected with Shaffer, as we have before stated, and says Ferguson represented himself as the president and superintendent of the company. He told Ferguson of the circumstances under which he had been induced to come, and that Ferguson replied, "that Shaffer had *written him about it*, and that he was surprised to find him not at work and that Shaffer had acted the d——n rascal." This conversation with the president of the defendant company must have occurred after its organization, otherwise there would have been no such officer. The statement as to what he said to Quintrell is nowhere denied or explained. Some weeks after the organization of the company, Quintrell was assigned to duty, but in a short time he was discharged without fault, and paid only for the time he was actually at work.

Learned counsel, in the natural zeal pertaining to advocacy, have not observed the significance of the facts we have cited as evidence from which a jury, under proper charge, might infer that the contract of hiring between Quintrell and the projectors of the defendant company had been adopted by the company after its organization. They are mistaken in the assumption that Shaffer and Ferguson were never connected with the corporation. They were both corporators, and, as such, a

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part of the first board of directors. Both were in connection with it when the acts tending to show adoption were done, Ferguson being president. Shaffer does not, in his very meager evidence, pretend that he had not been connected with the company. He only states that he was not interested at the time he was testifying, and fails to state when he had sold out. The evidence was not as clear and satisfactory upon any part of the case as we should require if the case was here for original consideration. The questions were submitted to the jury under what we must assume to have been a full and satisfactory charge. No error was assigned upon this charge, and no complaint is made of it in the petition for rehearing. The case is not one moving us to an exercise of our discretion under our rules, by looking to errors not assigned.

Dismiss the petition.

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Railroad *v.* Kelly.

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RAILROAD *v.* KELLY.

(Knoxville. October 13, 1892.)

1. COMMON CARRIER. *Liability for goods destroyed by fire at depot of destination.*

Common carrier had shipped goods to destination and deposited them in its depot at that point. The goods remained in the depot for four days, and were destroyed by fire on the fifth day. On each of the four or five days the consignee's drayman inquired of the carrier's agent for the goods, for the purpose of removing them, and was informed they had not arrived. The fire was not shown to have resulted from the carrier's negligence.

*Held:* The carrier is liable to the consignee for the value of the goods. His liability is, however, that of a warehouseman, not that of a carrier. His negligence consists, not in causing the fire, but in unnecessarily exposing the goods to its ravages.

Cases cited and approved: *Butler v. Railroad*, 8 Lea, 32; *Express Co. v. Kaufman*, 12 Heis., 165; *Lancaster Mills v. Merchants' Cottonpress Co.*, 89 Tenn., 35, 36; *Railway Co. v. Manchester Mills*, 88 Tenn., 653.

2. SAME. *Same.*

Under the rule adopted in Tennessee, a common carrier ceases to be liable as carrier *eo instanti* with the deposit of the goods in the depot of destination. Thereafter his liability is that of warehouseman.

Cases cited and approved: *Butler v. Railroad*, 8 Lea, 32; *Express Co. v. Kaufman*, 12 Heis., 165.

3. SAME. *Same. Proximate cause.*

The common carrier's negligence is the proximate cause of the loss, and he is liable as warehouseman for the value of the goods, where they were destroyed by fire not imputable to his negligence, after their deposit in the depot of destination, and after the consignee had demanded them and had been erroneously informed by the carrier's agent that they had not arrived. The negligence that caused the loss consisted in withholding the goods and exposing them to the fire.



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Railroad v. Kelly.

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Cases cited and approved: Deming & Co. v. Merchants' Cotton-press Co., 90 Tenn., 353; Railroad v. Manchester Mills, 88 Tenn., 653; Lancaster Mills v. Merchants' Cotton-press Co., 89 Tenn., 35, 36; Railroad v. Campbell, 7 Heis., 258; 16 Am. and Eng. R. Cases, 272; 23 *Id.*, 481; 82 N. Y., 413.

Cited and distinguished: Lamont & Co. v. Railroad, 9 Heis., 58.

4. MEASURE OF DAMAGES. *For total loss of goods in carrier's possession.*

Measure of damages for total loss of goods, caused by the carrier's negligence while they remained in the depot of destination, is the market value of the goods at that place at date of their destruction.

Cases cited and approved: Dean v. Vaccaro, 2 Head, 489; Erie Dispatch v. Johnson, 87 Tenn., 490; 117 U. S., 322; 111 U. S., 585.

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FROM HAMILTON.

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Appeal in error from the Circuit Court of Hamilton County. JOHN A. MOON, J.

LEWIS SHEPARD for Railroad.

ROBT. P. WOODARD and W. G. M. THOMAS for Kelly.

CALDWELL, J. This suit was brought by J. W. Kelly, before a Justice of the Peace, to recover from the East Tennessee, Virginia and Georgia Railway Company the value of five barrels of whisky. He recovered judgment for \$492, and, on appeal, the Circuit Judge, sitting without a jury, affirmed the Magistrate's judgment, adding interest thereto.

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Railroad v. Kelly.

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The railway company has appealed in error, and in this Court, as below, denies its liability, either as *common carrier* or *warehouseman*.

Kelly purchased five barrels of whisky in New York, and caused them to be consigned to himself at Chattanooga, his place of business. The East Tennessee, Virginia and Georgia Railway Company was the last carrier over whose line the goods passed. On April 24, 1891, that company unloaded the whisky from its car, and stored the same in its depot at Chattanooga, where it remained until the morning of the twenty-ninth of the same month, when it was destroyed by fire.

Kelly, through his drayman, called at the depot and demanded the whisky on April 25, 26, 27, and 28, generally twice a day, and was each time told by the company's agent that it was not there.

How the fire was produced is not disclosed.

Under these facts, the railway company is not liable as a *common carrier*. Its carrier responsibility terminated when the goods were safely stored in its depot, and before they were destroyed. *Butler v. Railroad Co.*, 8 Lea, 32; *Express Co. v. Kaufman*, 12 Heis. (last paragraph), 165.

We are aware that the authorities are in a state of irreconcilable conflict upon this question, several of the States having followed the lead of Massachusetts in holding that the liability of the common carrier, as such, is ended when the transportation is completed and the goods are safely stored, and several others having given their sanction

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Railroad v. Kelly.

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to the doctrine announced in New Hampshire, to the effect that the carrier responsibility continues until the consignee has had a reasonable opportunity, after the arrival of his goods, to receive them.

Discussion of the respective considerations upon which the two rules are rested by their opposing adherents, will not be indulged in this opinion, since this Court has heretofore adopted the Massachusetts rule, and no sufficient reason for changing the precedent already established is perceived.

The cases of *Butler v. Railroad Co.*, 8 Lea, 32, and *Express Co. v. Kaufman*, 12 Heis., 165, have been followed in several unreported cases, the last of which was *E. T., V. & G. Ry. Co. v. Gettys*, decided at present term.

In second American and English Encyclopedia of Law, pages 391-394, the two rules are stated, and many of the decisions in support of each cited. Tennessee is there erroneously referred to as one of the States adopting the New Hampshire doctrine. See also, on same subject, Story on Bailments, Sec. 543; Schouler's Bailments and Carriers, Secs. 512-514; and Hutchinson on Carriers (2d Ed., by Meacham), Secs. 367 to 374, inclusive. The last author, in Section 370, correctly places Tennessee among the States following the Massachusetts rule.

Then, as to these goods, at the time of their destruction, the railway company had ceased to be a common carrier with the liability of an insurer, and had assumed the less hazardous position of warehouseman, in which it was bound to use ordi-

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nary care and diligence only, and was responsible alone for the consequences of its negligence. Schouler, Bail. and Car., Secs. 101 and 513; *Lancaster Mills v. Merchant's Cotton press Co.*, 5 Pickle, 35, 36.

Is the railway company liable as warehouseman? If the loss resulted from its negligence as the proximate cause, yes; if not, no; for the doctrine of proximate and remote cause applies here, as in any other case where negligence is the ground of action. The burden of showing negligence, and its causal connection with the loss, was upon the plaintiff. Schouler's Bail. and Car., Sec. 101; 5 Pickle, 35, 36; 4 Pickle, 653; Hutchinson on Carriers (2d Ed.), Sec. 767.

In this case, there is no proof as to the cause of the fire; hence, the defendant is not chargeable with negligence in causing it. Mere proof of the fire and destruction of the goods does not show negligence. *Railway Co. v. Manchester Mills*, 4 Pickle, 653; 5 Pickle, 36. Therefore, if the plaintiff succeed, he must do so without reference to the cause of the fire.

It is distinctly shown that he demanded the goods several times, and that the defendant, without sufficient excuse, failed to deliver them. That alone makes a clear case of negligence; but, manifestly, that negligence did not cause the fire. Did it, nevertheless, proximately cause the loss of the goods?

The fire and the loss may have had different causes. The fire destroyed the goods, but it does

not follow that the cause of the fire and the cause of the loss to plaintiff were one and the same in legal contemplation; they may have been entirely different. The failure to deliver the goods when demanded did not cause the fire, but it did cause the loss in such sense that they would not have been lost without the failure. Had the defendant delivered the goods, they would have been removed and the loss averted. The negligent and wrongful detention of the goods, and that alone, exposed them to the fire; and, but for that detention, they would not have been destroyed, though the fire did occur. Thus, it becomes obvious that the negligence of the railway company was the proximate cause of the loss. The causal connection between the failure to deliver the goods and the injury to the plaintiff is complete.

In a late case, where a train broke in two, thereby exposing cotton, on the rear section, to a fire, which consumed it, this Court, speaking through Judge Snodgrass, said:

“The proximate cause of an injury may, in general, be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted, notwithstanding the latter. Illustrating by these facts: It is true the fire destroyed the cotton, and in that sense caused the loss, but it appears that, notwithstanding the occurrence of the fire, the cotton would not have

been burned by it had not the breaking of the train while it was being removed happened, so that, but for this fact, the cotton would have been saved. This [the breaking of the train] must therefore be held to be the proximate cause of the loss, and, if it was the result of negligence, the carrier must answer for it." *Deming & Co. v. Merchants' Cotton-press*, 6 Pickle, 353.

That definition and illustration of proximate cause is conclusive of this case. There, as here, the fire which consumed the goods was caused without the fault of the defendant, and there, as here, the goods became exposed to the fire through the negligence of the defendant, but for which the injury would not have been inflicted. There, as here, that negligence, and not the fire or its cause, proximately caused the loss to the owner.

*Lamont & Co. v. N. & C. R. R. Co.*, 9 Heis., 58, is not in conflict with the case last cited, or the decision here made.

Our attention has been called to several cases from other States.

In that of *Burlington & M. R. R. Co. v. Arms*, decided by the Supreme Court of Nebraska, and reported in sixteenth American and English Railroad Cases, 272, the consignee called for his goods several times after their arrival, and was told each time, by the company's agent, that they had not been received. Thereafter, without any other negligence on the part of the company, its depot was

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burned and the goods destroyed. The owner recovered the value of his goods.

In *Falkner v. Hart*, 82 N. Y., 413, the goods were called for upon arrival at destination, but delivery was refused until the next day, because it was not "convenient" then to deliver them. The warehouse and goods were destroyed that night by fire. The defendant was held liable for the loss.

In *K. C., Ft. S. & G. R. R. Co. v. Morrison*, a Kansas case, reported in twenty-third American and English Railroad Cases, 481, the owner demanded his trunk, and was informed it had not come, when, in fact, it had come. The company's depot was subsequently entered, the trunk broken open and robbed by burglars, without fault of the company. The owner obtained judgment for the contents of his trunk.

In *Richmond & Danville R. R. Co. v. Benson*, 86 Ga., 203 (S. C., 22 Am. St. R., 446), there was a deviation in route of shipment, causing some delay, and, after arrival of the goods, demand was made and delivery refused. The goods were thereafter destroyed in the depot by an unprecedented flood, and, upon suit being brought, the company was held liable for their value.

Though decided upon similar facts, those cases are not of much importance here, because in each of them the defendant was adjudged liable as common carriers, and that without reference to the question as to whether or not its negligence proximately caused the injury. In the Georgia case

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Railroad *v.* Kelly.

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the Court said that the wrongful acts of the company constituted a conversion of the goods. A mere inadvertent statement by the agent to the owner demanding goods then in the company's depot, that they have not arrived, is not a conversion. *L. & N. R. R. Co. v. Campbell*, 7 Heis., 258.

For the reasons stated, the railway company is liable, in this case, as warehouseman.

The goods having been totally destroyed, the measure of damages was the value of the goods at Chattanooga. *Hutchinson on Carriers*, Sec. 769; *Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S., 322; *M. & M. Ry. Co. v. Jurey*, 111 U. S., 585; *Dean v. Vaccaro*, 2 Head, 489; *Erie Dispatch v. Johnson*, 3 Pickle, 490.

Affirm the judgment with costs.



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RAILROAD v. KELLY.

(*Knoxville*. October 13, 1892.)

COMMON CARRIER. *Liability of carrier for goods destroyed at depot of destination.*

The matters decided in the case of Railroad v. Kelly, *ante*, p. 699, are re-affirmed in this case.

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FROM HAMILTON.

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Appeal in error from the Circuit Court of Hamilton County. JOHN A. MOON, J.

LEWIS SHEPARD for Railroad.

W. G. M. THOMAS and ROBT. P. WOODARD for Kelly.

CALDWELL, J. J. W. Kelly sued the East Tennessee, Virginia and Georgia Railway Company for its failure to safely transport and deliver five hundred pounds of smoking tobacco, intrusted to it for transportation. The Justice of the Peace before whom the suit originated rendered judgment in favor of the plaintiff for \$150, the value of the tobacco; and, on appeal, the Circuit Judge, hearing the case without a jury, affirmed that judgment.

The railway company has appealed in error.

Kelly bought the tobacco in question at Durham, N. C. It was shipped to him at Chattanooga by

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Railroad v. Kelly.

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rail, the East Tennessee, Virginia and Georgia Railway Company being the last carrier in the route. That company transported the tobacco to Chattanooga, and, on April 27, 1891, unloaded it from the car and stored it in the company's depot, where it was destroyed by fire on the morning of the twenty-ninth of the same month. Kelly sent his drayman to the depot, and, through him, demanded the tobacco in the forenoon, and again in the afternoon, of the twenty-eighth of April. Each time the company's agent told the drayman that the tobacco had not been received.

There is no proof as to the cause of the fire.

We hold, upon these facts, (1) that the railway company had ceased to be a common carrier, and assumed the less hazardous position of warehouseman, with respect to the tobacco, at the time of its destruction; (2) that, in the absence of proof to that effect, the railway company cannot be held to have been negligent in permitting or causing the fire; (3) that it was negligent in not delivering the goods when demanded; (4) that this negligence, though not producing the fire, was, nevertheless, the proximate cause of the loss to the owner; (5) and, finally, that the railway company is liable, as warehouseman, for the value of the goods at Chattanooga. All these questions are discussed in *Railroad v. Kelly*, ante, p. 699, just decided; hence, discussion of them here is unnecessary.

Affirm, with costs.

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Whitesides v. Stuart.

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## WHITESIDES v. STUART.

(Knoxville. October 20, 1892.)

1. MANDAMUS. *Does not lie to compel Judge of County Court to issue warrant, when.*

Mandamus does not lie to compel Judge or Chairman of County Court to issue warrant upon County Treasury for claim due by account, the correctness of which he disputes. His duties as financial agent of the County require him to protect the County against payment of unjust demands, and the Court will not compel him, by mandamus, to pay an adjudicated debt that he has decided to be unjust. The creditor's remedy is by suit for his debt.

Code construed: §§ 485, 582 (M. & V.); §§ 423, 525 (T. & S.).

Cases cited and approved: Morley v. Power, 5 Lea, 691; Turnpike Co. v. Marshall, 2 Bax., 123.

2. SAME. *Must be prosecuted in name of State.*

Mandamus proceedings must be prosecuted in name of the State, and not in the name of an individual citizen, but may be prosecuted on his relation.

3. SAME. *Returnable before Court, not before Judge.*

Alternative writ of mandamus must be returned to Court and heard in term, and cannot be returned before the Judge and heard at chambers.

Code construed: §§ 4311, 4312, 4315 (M. & V.); §§ 3568, 3569, 3572 (T. & S.).

4. SAME. *Bond for costs required.*

The relator in mandamus case must give bond for costs.

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Whitesides v. Stuart.

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5. SAME. *Petition sworn to before whom.*

Petition for mandamus is not properly sworn to, where affidavit is made before County Court Clerk.

Code construed: § 4310 (M. & V.); § 3567 (T. & S.).

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FROM HAMILTON.

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Appeal in error from Circuit Court of Hamilton County. JOHN A. MOON, J.

DEWITT & THOMAS for Whitesides.

WHITE & MARTIN for Stuart.

LEA, J. This is a *mandamus* against the County Judge, and brought in the Circuit Court of Hamilton County by H. M. Stuart individually, without the intervention of the State, on relation of petitioner. The judgment was in favor of petitioner, and the County Judge appealed.

The petitioner claims to have been an overseer of a public road, and seeks to force the County Judge to draw his warrant for twenty-seven days' work at \$1 per day, and also for \$28 for having furnished his own team to work the road. He gave no bond for costs, and did not take the oath *in forma pauperis*, and swore to the petition before the Deputy Clerk of the County Court. The Judge

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*Whitesides v. Stuart.*

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issued the alternative writ in vacation, and made it returnable to a day in vacation, commanding the County Judge to draw his warrant or show good cause for not doing so. On the return day of the writ, and before the Circuit Judge, at chambers, the County Judge appeared, and moved to quash the alternative writ and dismiss the suit, assigning, among other reasons, that the proceeding is not brought in the name of the State on relation of petitioner; because the writ is not made returnable to a term of the Court, but to a day in vacation; because no security was given for costs, and because the petition is not supported by affidavit before any official authorized by law. To these actions the County Judge excepted, and obtained leave to rely upon the several grounds of motion in his answer. Thereupon the answer was filed, relying upon the grounds of motion, and making, in addition thereto, several defenses. Among others, that petitioner's claim was not presented to defendant and sworn to as the statute required, and demand made for a warrant; that he refused to issue the warrant because the claim was unjust, exorbitant, and not owing by the county. Issue was joined upon the several defenses. On the return day, in vacation, the Circuit Judge, on application of defendant, continued the hearing until the first day of the regular term of the Court. At the regular term the case was heard and judgment rendered against the County Judge, overruling his motion to dismiss, adjudging

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Whitesides v. Stuart.

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his return insufficient, and awarding a peremptory writ for the amount claimed by petitioner. It was agreed, upon the hearing, that the claim of petitioner was properly sworn to, and the County Judge refused to issue the warrant because the account was exorbitant and entirely too much, and the refusal was for this reason alone.

The Court erred in not dismissing the suit, both for reasons stated in the motion to dismiss and upon the merits.

*First.*—Because the proceedings should be in the name of the State, on the relation of the petitioner. Such is the approved practice in this State.

*Second.*—Because the writ must be returned like any other writ to a term of the Court, and not to the Judge at chambers. The word *Court* is used all through the statute upon the subject of *mandamus*. “The writ is returnable to the Circuit Court.” Code (M. & V.), § 4311. The alternative writ commands the defendant to do the act required to be performed or show cause before the *Court*. Code (M. & V.), § 4312. “If the answer deny any material facts stated in the petition, the Court may determine the issue upon evidence, or cause them to be submitted to a jury.” Code (M. & V.), § 4315. If the alternative writ is issued in vacation, it should be returnable to the next term of the Court, and not before the Judge at chambers.

*Third.*—Because no bond for cost was executed. Caruthers’ History of a Lawsuit, Sec. 587.

*Fourth.*—Because the petition was not sworn to as required by law. It was sworn to before the Clerk of the County Court. Our statute (M. & V. Code, § 4810), taken from Sec. 1, Ch. 52, of the Acts of 1881, entitled “An Act to regulate the practice on writs of *mandamus*,” is as follows: “That the Circuit Judges of this State shall have power to issue writs of *mandamus*, upon petition, supported by affidavit, before any Judge, Justice of the Peace, or Clerk of any Circuit Court.” It will thus be seen that, by the very terms of the statute, the affidavit must be made before a Judge, Justice of the Peace, or Clerk of the Circuit Court.

As above stated, upon the merits the peremptory *mandamus* should not have been granted. Simply because the law fixes a dollar a day for overseers of roads, and the account named the number of days, and is sworn to as required by statute, does not make it the duty of the County Judge to issue his warrant without an investigation of the correctness of the account. If such was the case, then a *mandamus* would be proper in case of a refusal, but here the defendant decided that the account was unjust and exorbitant, and therefore he refused to issue the warrant. The County Judge is the “accounting officer and general agent of the county,” and, as such, it is his duty “to audit all claims for money against the county,” and to audit and settle the accounts “of any person intrusted to receive or expend any money of

the county," and to minutely examine and settle the accounts of the county officers. Code (M. & V.), § 582, subsec. 3, and § 485, subsecs. 4, 6.

The County Judge has passed and acted upon the claim of petitioner, as presented, and his official judgment is against the claim, and the award of a peremptory writ would be to compel him to act contrary to his judgment. Whether to issue the warrant or not, as claimed by petitioner, depends upon the exercise of official judgment by the defendant, and rests in his sound discretion, and cannot be controlled by *mandamus*. 5 Lea, 691; High, Ex. Leg. Rem., Secs. 101, 102. Only ministerial acts can be controlled. 2 Bax., 123.

The petitioner's claim having been refused by the County Judge, he has his remedy by suit against the county for whatever may be justly due him.

The judgment of the Court below is reversed, the petition is dismissed, and petitioner will pay costs.



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## RANSOME v. STATE.

(Knoxville. October 22, 1892.)

1. CONSTITUTIONAL LAW. *Amendatory statutes, necessary recitals in.*

The constitutional requirement that amendatory statutes shall recite in their "caption, or otherwise," the "title or substance" of the statute amended, is satisfied by the recital of the *subject* of the statute amended in the *body* of the amendatory statute, without more.

Constitution construed: Art. II., Sec. 17.

Case cited and approved: *State v. Gaines*, 1 Lea, 734.

2. SAME. *Same. Case in judgment.*

Section 4881 (T. & S.) Code makes horse-racing legal when run upon a regular track. Acts 1891, Ch. 115, amends said section of the Code by providing "that said section and this amendment shall apply to trotting and pacing races as well as running races."

*Held*: The amendatory Act sufficiently recites the "substance" or subject of the original statute—to wit: horse-racing—and is valid.

Code construed: § 5701 (M. & V.); § 4881 (T. & S.).

Acts construed: Acts 1891, Ch. 115.

*Question reserved*: Is it a sufficient recital of the "title" of the Act amended to refer to it in caption or body of amendatory Act as a designated section of the Code of Tennessee?

3. GAMING. *Horse-racing.*

Betting on horse-races is illegal unless the race is run, trotted, or paced upon a track situated in this State, and inclosed by a substantial fence, and the bet or wager made within that inclosure. Although

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the race was run upon a lawfully inclosed track, the bet or wager was not made within the inclosure under the facts in this case.

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FROM HAMILTON.

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Appeal in error from Circuit Court of Hamilton County. JOHN A. MOON, J.

F. O. WERT for Ransome.

Attorney-general PICKLE for State.

LURTON, J. Appellant was convicted upon an indictment which charged him with unlawful gaming. The indictment was for betting upon horse-races, the betting not having been done upon and within a lawful race-course within this State.

The Act making such betting unlawful is Ch. 115, Acts 1891, and it is in the following words:

“An Act to amend Section 4881 of the Code of Tennessee, being Section 5701 of Milliken & Vertrees’ revision.

“SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That Section 4881 of the Code of Tennessee be, and the same is hereby, amended as follows, viz.: That said section and this amendment shall apply to trotting and pacing races as well as running races.

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Ransome v. State.

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"Sec. 2. *Be it further enacted*, That it shall be unlawful gaming to bet or wager in any way upon any horse-race unless the race-track upon which the race is run, trotted, or paced be inclosed by a substantial fence, and the bet or wager to be made within said inclosure upon a race to be run, trotted, or paced within said inclosure."

It is objected that the Act is void under Art. II., Sec. 17, of the State Constitution, requiring amendatory Acts to recite in their "caption, or otherwise," the "title or substance" of the Act amended.

Reserving the question as to whether a reference in the title to the law amended as being a particular section of the Code of Tennessee, we are of opinion that this amendment is valid, because there is contained in the body of the Act a sufficient reference to the "substance" of the Act amended. The requirement of the Constitution is that the amending Act shall contain in its "*caption, or otherwise,*" the "*title or substance*" of the Act amended. If the caption contains no reference to the "title or substance" of the Act amended, we must then see if in any other way the Act recites the Act amended. No other meaning can be attached to the word "otherwise," used in this clause. The recital in the amending Act need not be in the caption if a sufficient recital is "otherwise" made of the amended Act.

Neither does the Constitution require that the

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Ransome v. State.

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amended Act be recited by its "*title*" alone, for if the "*substance*"—that is, the subject of the Act amended—be recited, it will be a sufficient recital. Such a reference to the subject or substance will sufficiently identify the law intended to be amended. When we turn to § 4881 of the Code of Tennessee, we find that its subject was horse-racing. This subject is recited in the Act of 1891, the language of the first section being "that said section and this amendment shall apply to trotting and pacing races *as well as running races*." This clearly recites the substance or subject of the Act amended as one referring to *running races*. The recital of the substance of the Act amended is quite as clear and satisfactory as that found in the Act sustained by this Court in *State, ex rel., v. J. L. Gaines, Comptroller*, 1 Lea, 734.

The manner in which appellant conducted his business, as stated by himself, was this: "I operate the place called the Turf Exchange, in the city of Chattanooga; that is, I am the agent of Lon Powell, who is a book-maker on the race-tracks at Memphis and Nashville. I take orders for money here, in the city of Chattanooga, and the same is telegraphed to Memphis or Nashville, or wherever the races are being run. I use a card like that filed as evidence, and the depositors of the money have to pay the additional sum of ten cents for the transmission of the money to either of the two places. I receive a salary of three dollars per day for my services as agent of the

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party mentioned. I settle with Powell once a week, and give a statement of all the business. If one wishes to place money on a horse and books are closed at the race-track, the money is refunded to him, less the ten cents. It is thoroughly understood among all who deal at the exchange that I am acting only as agent of others, and that they have to pay the additional ten cents as commission for running the business, or to defray the expenses. All orders taken are at once sent to the race-track to the parties in the inclosure, and if the party making the bet loses, the money is retained, and if the party is successful, I pay the money to him. The tracks at the places named, where the races are run, are regular race-tracks, are in the turf association, and are inclosed with good and substantial fences."

Another witness adds this further description of the methods of the exchange: "The defendant has all the horses which are going to run in the race put upon a board, where they can be seen, and also has the odds posted where they can be seen by those who desire to put any money on the race. We give to Mr. Ransome, say \$10; he notifies us that he represents Lon Powell, who is a book-maker on the track at Memphis, and that money will be sent there to be placed on the horse we desire to bet on. Mr. Ransome has a telegraph-wire in the room, and sends the money direct to the track; at least, he says he does. If

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the horse we bet on wins the race, Mr. Ransome pays us the money."

The card or receipt furnished the better is in these words:

"COMMISSION OFFICE.

"NO BETTING DONE OR PERMITTED HERE.

"CHATTANOOGA, TENN., ———, 1892.

"Received ——— Dolls., to be sent on commission to race-track at ———, and there placed. Horse <sup>1st.</sup><sub>1st or 2d.</sub> ———, at track quotations, if such can be obtained.

"It is understood and agreed that the undersigned act in the premises as common carriers only, for the purpose of transferring the money above mentioned to the place designated.

"Charge commission, ten cents, for forwarding.

"*Notice.*—Amount of order returned, less commission, where a failure to execute is due to accidental or other unavoidable delays in transmission."

From this evidence, we cannot conclude but that the conviction was authorized: The betting was done in Chattanooga, and not within the inclosure of a race-course. That defendant was acting as agent for another, who was selling pools on an authorized track, is of no importance. The bet was made in Chattanooga, although the money might be sent to the principal on the track. If the bet was lost, the money was retained. If the

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horse bet on won, defendant paid the bet at the place where it was made. The Act only authorizes betting on races run in this State, and within inclosures, and the betting must be done within the track. If Mr. Powell could not make, offer, or accept bets except upon and within such track, he cannot do by an agent what he could not do himself. The object of the exception made by § 4881 was to permit gaming upon races to encourage horse-raising and improve horse-stock. The limitation put upon the Act excepting such gaming from the ordinary penalties of the law, is to limit such gaming to the time and place where the race is being run. If the business done by defendant is not gaming at the place where the money is put up on the race, but is to be treated as a bet made at the place to which the money is to be sent, and by the person for whom the agent acts, then there would be nothing unlawful in a "turf exchange" operating for principals on races run without the State, and thus gaming at all times and on all races run anywhere, would be licensed, by resorting to the scheme shown by this evidence. The statute plainly intended to legalize betting done within a lawful track, and nowhere else.

Affirm the judgment.

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Richards v. State.

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## RICHARDS v. STATE.

(Knoxville. November 1, 1892.)

1. CRIMINAL PRACTICE. *Putting defendant under rule while a co-defendant testifies, erroneous.*

One of several defendants jointly upon trial for crime cannot be put under rule while a co-defendant gives evidence on his own behalf. Such constrained absence of a defendant during his trial upon a criminal charge is in violation of his constitutional "right to be heard by himself and his counsel."

Constitution construed: Art. I., Sec. 9.

Cases cited and approved: *Andrews v. State*, 2 Sneed, 550; *Witt v. State*, 5 Cold., 11.

2. CRIMINAL EVIDENCE. *Defendant's evidence competent for and against a co-defendant jointly tried.*

Evidence given by a defendant on his own behalf, upon his trial for a criminal charge is competent, and proper for the consideration of the jury, both for and against a co-defendant jointly upon trial.

Act construed: Acts 1887, Ch. 79.

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FROM KNOX.

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Appeal in error from Criminal Court of Knox County. J. W. SNEED, J.

S. G. HEISKELL for Richards.

Attorney-general PICKLE for State.



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Richards v. State.

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LURTON, J. John and James Richards were jointly indicted for murder, and tried together. Both were convicted—James of an assault and battery, and John of voluntary manslaughter. The latter only has appealed. After the conclusion of the State's evidence, the defendants announced their purpose to testify as witnesses, each for himself. James was first offered for examination, whereupon the Court, on motion of the District Attorney, ordered that John should be placed under the rule, and excluded from the court-room during the examination of his co-defendant. To this ruling, and against his consequent exclusion from the court-room while his co-defendant was being examined, John Richards excepted. The ruling of the Court was erroneous.

The Constitution guarantees to every defendant in a criminal prosecution "the right to be heard by himself and his counsel." Art. I., Sec. 9.

This guarantee includes the right to be present at every stage of the trial. *Andrews v. State*, 2 Sneed, 550; *Witt v. State*, 5 Cold., 11; Cooley's Constitutional Limitations, 390.

It has been suggested that the right of a defendant to testify in a criminal prosecution is by the statute conferring the right limited to the delivery of evidence "for himself," and that he may not testify either for or against a co-defendant. If this were conceded, it would nevertheless be error to prevent a co-defendant from being present during such evidence. How else could he see and

know that the evidence was limited as indicated by the suggestion, or that the jury were properly guarded against giving effect to it as against the absent co-defendant. But we do not assent to the limitation put upon the testimony of such a co-defendant. When one of several defendants on trial together voluntarily becomes a witness, he is a witness for all purposes. If he knows facts injurious to a co-defendant, they may be brought out either by his own counsel or by the State. The witness's best line of defense for himself may lie in evidence involving the guilt of his co-defendant. On what principle shall it be said that such testimony would be inadmissible? If admissible in his own interest, how is its effect upon his co-defendant to be prevented? Practically it could not fail to be injurious and prejudicial, even if the jury were instructed to disregard it as to the co-defendant affected. We know of no principle which would exclude any competent evidence simply because it came from a co-defendant testifying for himself under the statute. In view of the possible prejudice of such evidence, or of its possible advantage, the right to be present, and to hear and examine such a witness when testifying for himself, is an important right to every other defendant jointly on trial with the testifying defendant. The violation of this right is clearly reversible error.

For this error, as well as for another occurring in the charge, and which we state orally, this case must be reversed and remanded for a new trial.

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Stevens v. State.

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## STEVENS v. STATE.

(Knoxville. November 3, 1892.)

1. INDICTMENT. *For felonious assault includes lower grades of offense.*

Doctrine re-affirmed that indictment for assault with intent to commit murder in first degree includes the charges of attempt, or assault with intent, to commit murder in second degree and voluntary manslaughter, and the charge of simple assault.

Code construed: §§ 5375, 5379, 6061, 6062 (M. & V.); §§ 4626, 4630, 5222, 5223 (T. & S.).

Cases cited: Smith v. State, 2 Lea, 614; State v. Williams, 5 Bax., 655.

2. SAME. *Same.*

But such indictment does not include any such offense as "attempt to commit involuntary manslaughter," for the reason that no such offense exists, or is known to criminal law.

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FROM KNOX.

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Appeal in error from Criminal Court of Knox County. J. W. SNEED, J.

CHARLES NELSON and HORACE FOSTER for Stevens.

Attorney-general PICKLE for State.

SNODGRASS, J. Stevens was indicted for assault with intent to commit murder in the first degree. He was tried and found guilty of an "attempt to commit involuntary manslaughter," and sentenced to one year's imprisonment in the penitentiary. From this judgment he appeals in error.

The indictment was under § 4626 of the Code, and the conviction of "attempt to commit" any of the crimes embraced in it was, if involuntary manslaughter is included, authorized by § 5222 of the Code. The section under which the indictment was found became law in 1829. From that date to 1879 it had been treated by the profession and the Courts as including but one felony, embracing the intent to commit murder in the first degree, but during the year last mentioned it was held to include and authorize conviction for assault with intent to commit murder in the second degree. *Smith v. State*, 2 Lea, 614.

This construction has ever since prevailed. In the *Smith* case the charge of the Circuit Judge was to the effect that one other felony, that of intent to commit voluntary manslaughter, was included in the indictment, but as the jury returned a verdict of guilty of assault with intent to commit murder in the second degree, it did not become necessary to say in that case that the statute did include assault with intent to commit voluntary manslaughter; but the result must embrace that offense, upon the same ground the statute was held to include the other.

It had, five years before, been held that an indictment for assault with intent to commit manslaughter was good under another section of the Code, the illustration put by the Court to justify the construction being one of voluntary manslaughter, though no distinction was made in

terms between voluntary and involuntary. Code, § 4630; *State v. Williams*, 5 Bax., 655.

As before shown, this is an indictment under § 4626, and if it be held to cover and include all the offenses of § 4630, neither case referred to settles that there is such an offense embraced in either section, or such an offense at all as an "assault with intent to commit involuntary manslaughter;" and we hold there is no such offense.

We have been particular to note and limit the two cases cited to the precise effect of each, and to show that it is not necessary to disapprove either in arriving at our present conclusion. We deem it proper to add, however, that if they, or any other case heretofore decided, could be held to fairly determine the question adversely to the view now taken, such case is expressly disaffirmed and overruled.

The verdict of the jury in this case was an acquittal of all the felonies involved in the indictment, as though it had, in terms, been that defendant was not guilty of assault with intent to commit murder in the first or second degree or voluntary manslaughter. It follows that so much only of the verdict as specified an offense and fixed a punishment not authorized is involved and judgment thereon erroneous.

The judgment is therefore reversed, and the case remanded for further proceedings, and trial upon the misdemeanors included in the indictment. Code, § 5223.

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